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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-671

DELAWARE STATE BOARD OF EDUCATION,
Petitioners,

v.

BRENDA EVANS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD R. WIER, JR.,
Attorney General of the
State of Delaware,

REGINA M. SMALL,
Deputy Attorney General of the
State of Delaware,
State Office Building,
Wilmington, DE 19801

WILLIAM PRICKETT,
MASON E. TURNER, JR.,
PRICKETT, WARD, BURT & SANDERS,
1310 King Street,
Wilmington, DE 19801

Attorneys for the Delaware State Board of Education, Petitioners.

PHILIP B. KURLAND,
Two First National Plaza,
Chicago, Illinois. 60603
(312/372-2345)
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners respectfully request that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in the above-encaptioned cause.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit is not yet reported. It is set out in the Appendix hereto at pages A1 to A62. The opinions of the United States District Court for the District of Delaware are reported at 435 F. Supp. 832 (1977) and 447 F. Supp. 982 (1978), set out in the Appendix at pages A63 to A212.

JURISDICTION.

The opinion and orders of the United States Court of Appeals for the Third Circuit were filed on July 24, 1978. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Do the decisions of this Court require that the same standards for judicial remedies be applied in Southern and Border State school desegregation cases as in Northern, Midwestern, and Western State cases?

2. May a federal district court impose a remedy for school segregation that is not framed to cure alleged constitutional violations but is justified only on a general finding of failure to act to ward off the effects of demographic changes not caused by government action?

3. Is it within the discretion of a federal district court to dismantle the elected governments of eleven local school districts and to replace them with a single unelected school board created to encompass two-thirds of the State's public school students, although there is no finding of any definable constitutional violation by any of the school districts except a plaintiff school district or any finding of how such a decree cures a constitutional violation?

STATEMENT.

The federal district court for the District of Delaware, with the approval of the Court of Appeals for the Third Circuit, has obliterated eleven independent political entities of the State of Delaware in order to effectuate a judicially mandated racial balance plan encompassing all public schools in northern New Castle County. This "unique" and unprecedented judicial action leaves Delaware—a State with a long coveted tradition of small school districts designed to foster local popular control of public education—with a totally unbalanced public education system. The number of school districts in the State has been reduced from twenty-three to thirteen, one of which, that created by the trial court, includes two-thirds of the State's public school students. The judicially created school district is more than ten times larger than that of the second largest district in the State.

This unprecedented judicial action was predicated on the allegations—unsupported by factual determinations—of eight disparate constitutional violations of an allegedly interdistrict nature. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975). There has never been any explicit appellate review of any of the alleged violations which form the basis for this total restructuring of Delaware public education. When these petitioners sought interlocutory review of the District Court's finding of interdistrict violations, this Court summarily affirmed a judgment requiring the submission of alternative plans, including interdistrict plans. *Buchanan v. Evans*, 423 U. S. 963 (1975). That summary action by this Court has since been held to preclude further inquiry into the propriety or extent of the alleged violations. *Evans v. Buchanan*, 555 F. 2d 373, 377-8 (3rd Cir. 1977); *Evans v. Buchanan*, — F. 2d — (3d Cir. 7/24/78) (A-10, fn. 4).

Prior to *Brown v. Board of Education*, 347 U. S. 483 (1954) ("Brown I"), which affirmed *Gebhart v. Belton*, Del. Supr., 91 A. 2d 137 (1952), Delaware imposed school segregation by statute. In northern Delaware, prompt and voluntary affirmative action was taken by the school districts in New Castle County to comply with this Court's mandate. See *Brown v. Board of Education*, 349 U. S. 294, 299 (1955).

> "In short, integration in the State of Delaware, which has already integrated many of its schools, *particularly in the Wilmington metropolitan area*, should not be viewed, gauged or judged by the more restrictive standards reasonably applicable to communities which have not advanced as far upon the road towards full integration as Delaware." *Evans v. Ennis*, 281 F. 2d 385, 393 (3rd Cir. 1960). (Emphasis added.)

Compliance was less prompt and voluntary in rural, southern Delaware, prompting the initiation of the predecessor of the instant litigation. That litigation was concluded in 1961 with the approval of a State-wide desegregation plan. *Evans v. Buchanan*, 195 F. Supp. 321 (D. Del. 1961). With the exception of a single dispute concerning an attendance area in one northern Delaware school district, *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962), the federal courts received no complaints concerning the desegregation of school districts in the area now under consideration. With the exception of the plaintiff Wilmington School District, all school districts in the affected area were explicitly found to be operating unitary school districts, thus having effectuated the transition required by this Court's mandate in Brown II. See *Evans v. Buchanan*, 393 F. Supp. at 437 n. 19.

Under the rubric of the original caption in a case which had been directed only to southern Delaware, new

parties plaintiff in 1971 challenged the growing urban concentration of black population in the City of Wilmington and its contrast to the predominantly white suburban population in some surrounding school districts. The condition complained of and its causes was identical to those in other cases which have reached this Court. See *Bradley v. School Board of Richmond, Virginia*, 412 U. S. 92 (1973); *Milliken v. Bradley*, 418 U. S. 717 (1974).

Prior to this Court's decision in *Milliken v. Bradley, supra*, the District Court initially found only an intradistrict violation in the City of Wilmington in the failure to eliminate all vestiges of de jure segregation in Wilmington in connection with five identified schools. *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974). The District Court nevertheless directed the submission of an interdistrict desegregation plan, in addition to a Wilmington-only plan.

Following this Court's opinion in *Milliken v. Bradley, supra*, based on exactly the same record, the District Court issued another opinion and order requiring an interdistrict remedy. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975). Although as noted above, the District Court found a variety of actions which it characterized as interdistrict constitutional violations, see *Evans v. Buchanan*, 555 F. 2d at 384, the alleged violations were for the most part matters that were not within the control or purview of school officials but related to State or Federal governmental activity or inactivity with regard to housing.

Following this Court's summary affirmance, the District Court issued a preliminary decision directing the dissolution of the eleven school districts in northern New Castle County and their replacement by a single school board, with the direction that pupils be reassigned so that each grade in each school building include 10 to 35% black students. *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del.

1976). As noted, the Court of Appeals refused to examine the validity of the alleged constitutional violations and affirmed by a four to three vote, but directed that the racial ratios be eliminated. *Evans v. Buchanan,* 555 F. 2d 373 (3rd Cir. 1977). This Court denied certiorari on October 3, 1977. 434 U. S. 880 (1977).

The Court of Appeals gave the State sixty days to formulate an alternative to the dissolution of the eleven school districts. The State legislature enacted a voluntary interdistrict transfer plan providing for interdistrict transfers on a majority to minority racial basis. 61 Del. Laws Ch. 32 and 67. Pursuant to this legislative initiative, approximately 14% and 26% of the black students in the majority black Wilmington and DeLaWarr school districts, respectively, transferred to majority white districts. This substantially raised the black enrollment percentage in virtually all of the majority white districts. For instance, in the most recently completed school year, the Alexis I. DuPont School District had 22% black enrollment while the Mount Pleasant School District had 16.7% black enrollment (having previously been 3.9% and 2.7% respectively.) This legislative remedy was a direct response to the alleged constitutional violations, namely, the concentration of blacks in the urban Wilmington School District. *Evans v. Buchanan,* 393 F. Supp. at 438.

These petitioners urged the District Court to make the requisite finding of incremental segregative affect required by this Court's decision in *Dayton Board of Education v. Brinkman,* 433 U. S. 406 (1977), and further urged that those segregative effects—concentration of blacks in Wilmington—were most appropriately redressed by the interdistrict transfer program which proved so successful in fact in relieving that concentration.

The District Court rejected the legislative response but stayed the dissolution of the eleven school districts until July 1, 1978. *Evans v. Buchanan,* 435 F. Supp. 832 (D. Del. 1977). The District Court then mandated a pupil reassignment plan which will require that *every student* in the former eleven district area be reassigned from his local school for at least three and as many as nine of his public school years. The Court further required reassignment of administrative staff, teachers, and other staff, eliminated popular control of the new school system for five years, imposed a number of compensatory education programs to be initially funded by the State, and ruled that the State's financial contribution to the new district could not decline below historic levels. *Evans v. Buchanan,* 447 F. Supp. 982 (D. Del. 1978).

The Court of Appeals refused to act on the petitioners' request for a stay prior to the ordered extinction of the eleven school districts on July 1, 1978. Thereafter, the petitioners applied to this Court for a stay of the pupil and faculty reassignment components of the Court orders, which was denied by Mr. Justice Brennan on September 1, 1978. *Buchanan v. Evans,* — U. S. — (47 U. S. L. W. 3127). A subsequent reapplication to Mr. Justice Rehnquist by seven of the original school districts was denied. *Alexis I. duPont School District v. Evans,* — U. S. — (September 8, 1978). The petitioners herein did not join in that reapplication because of the recognized practicalities of the situation, school being scheduled to open on September 11, 1978. The opinions denying these two applications for a stay indicate a difference of opinion as to the effect of the prior actions of this Court in this case.

It is from the opinion and judgment of the Court of Appeals for the Third Circuit that this petition for certiorari is taken.

REASONS FOR GRANTING THE WRIT.

I.

The Judgment Below, That a Remedial Decree in a School Desegregation Case Need Not Be Framed as a Cure for Alleged Constitutional Violations, Is in Conflict With the Rulings of This Court.

For purposes of this petition, we assume, contrary to fact, that the courts below, in finding alleged constitutional violations, met this Court's standards that such violations must have resulted from a purpose or intent to discriminate. *Washington v. Davis,* 426 U. S. 229 (1976); *Dayton Board of Education v. Brinkman,* 433 U. S. 406 (1977). We assume, that is, that there did occur one or more of the alleged violations on which a remedial decree could be predicated. We do contend, however, that the lower courts were nevertheless obligated to meet this Court's rulings that a remedial decree must be fashioned as a cure for the alleged violations, i.e., to restore plaintiffs to the conditions that would have obtained had there been no such violations.

In *Dayton, supra,* this Court clearly announced that the function of the trial court is "to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff." 433 U. S. at 420. It must then "determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as . . . compared to what it would have been in the absence of such constitutional violations." *Id.*

The courts below did not follow this standard. Instead, they saw their task as the elimination of "racially identifiable schools" in all eleven school districts and the achievement of racial balance within this geographical

area. The decree effectuates the understanding of the lower courts and rejects the standard of *Dayton.* So far as can be told, the justification for failing to follow Dayton is that Delaware was one of the original de jure States, as to whom, it is presumed, a different rule from that applicable to all the other States of the Union may be imposed. But this is a distinction that finds no support in any decision of this Court.

It is incumbent on this Court to establish that there is a single standard for school desegregation decrees to be applied to all States or to adopt the position that the Southern and Border States are subject to punitive decrees that, because of the absence of original sin, may not be imposed on others. There are a very large number of cases pending in the Fourth and Fifth Circuits the outcomes of which are dependent upon which rule this Court will choose to adopt.

II.

The Courts Below, in Totally Restructuring the Local Governance of Education in Delaware by Abolishing Eleven Democratically Elected School Boards and Replacing Them With a Single Judicially Appointed Board, Exceeded Their Authority as Defined by the Decisions of This Court.

In denying the application for a stay in this case, Mr. Justice Rehnquist aptly noted that "no case from this Court has ever sanctioned a remedy of this kind, or any remedy remotely like it." *Alexis I. duPont School District v. Evans,* — U. S. — (9/8/78). The extraordinary concept of the power of federal courts to restructure local government exhibited by the courts below is, indeed, novel and for that reason alone invokes an expression of approval or disapproval by this Court. It is also, however, in conflict with the notions earlier expressed by this Court about

the limits of judicial power over governmental organization within the States. For, as this Court said, in *Hills v. Gautreaux*, 425 U. S. 284, 296 (1976), in explaining its ruling in *Milliken v. Bradley, supra*:

> "The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation."

Thus, the courts below have done here exactly what this Court has said was forbidden them in *Milliken*. This conflict with this Court's decision also calls for judicial review here.

CONCLUSION.

For the reasons heretofore stated, this Court should grant the petition for writ of certiorari, treat the merits of the controversy that has yet to receive any explicit appellate review of the merits of the case, and reverse the judgment below.

Respectfully submitted,

RICHARD R. WIER, JR.,
Attorney General of the State of Delaware,

REGINA M. SMALL,
Deputy Attorney General of the State of Delaware,

State Office Building
Wilmington, Delaware 19801

WILLIAM PRICKETT,
MASON E. TURNER, JR.
PRICKETT, WARD, BURT & SANDERS,
1310 King Street
Wilmington, DE 19801
Attorneys for the Delaware State Board of Education, Petitioners.

PHILIP B. KURLAND,
Two First National Plaza
Chicago, Illinois 60603
(312/372-2345)
Of Counsel.

Appendix.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 24, 1978.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2336/7, 78-1143/8 and 78-1743

BRENDA EVANS, et al.,

LILLIAN RICHARDSON
MARY WOODS
WILBUR R. CARR, SR.
CLIFTON A. LEWIS
JEANNE Q. LEWIS

BOARD OF PUBLIC EDUCATION OF THE CITY OF WILMINGTON (Intervening Plaintiff)

THE URBAN COALITION OF METROPOLITAN WILMINGTON INCORPORATED

v.

MADELINE BUCHANAN, et al.,

ROBERT H. McBRIDE
ELISE GROSSMAN
JOSEPH J. CROWLEY
WILLIAM E. SPENCE
CLYDE BISHOP and
RICHARD H. FARMER, constituting all the members of the State Board of Education of the State of Delaware

DELAWARE ASSOCIATION OF SCHOOL BOARDS

Intervening Defendants
Alexis I. duPont, Alfred I. duPont, Appoquinimink, Claymont, Conrad, Marshallton-McKean, Mt. Pleasant, New Castle-Gunning Bedford, Newark, and Stanton School Districts
DeLaWarr School District

Alexis I. duPont School District,
Appellant, No. 77-2336

Delaware State Board of Education and the following defendant school districts: Alexis I. duPont School District, Alfred I. duPont School District, Claymont School District, Conrad Area School District, New Castle-Gunning Bedford School District, Marshallton-McKean School District, Newark School District, Mount Pleasant School District and Stanton School District,
Appellants, No. 77-2337

Claymont School District and Stanton School District,
Appellants, No. 78-1143

New Castle-Gunning Bedford School District,
Appellant, No. 78-1144

Delaware State Board of Education,
Appellant, No. 78-1145

Alfred I. duPont School District, Alexis I. duPont School District, Conrad School District and Mount Pleasant School District,
Appellant, No. 78-1146

Newark School District,
Appellant, No. 78-1147

Marshallton-McKean School District,
Appellant, No. 78-1148

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(D. C. Civil Nos. 1816-1822)

Argued In Banc May 10, 1978

Before: ALDISERT, ADAMS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*.

Samuel R. Russell, Esq.
Biggs and Battaglia
1206 Farmers Bank Building
Wilmington, Delaware 19801

COUNSEL FOR ALEXIS I. DUPONT SCHOOL DISTRICT

Richard R. Wier, Jr.
Attorney General of the State of Delaware

Regina M. Small
Deputy Attorney General of the State of Delaware
Wilmington Tower Building
Wilmington, Delaware 19899

William Prickett, Esq.
Mason E. Turner, Jr., Esq.
Prickett, Ward, Burt & Sanders
1310 King Street
Wilmington, Delaware 19899

H. James Conaway, Jr., Esq.
Young, Conaway, Stargatt & Taylor
1401 Market Tower
Wilmington, Delaware 19899

Of Counsel:
Philip B. Kurland, Esq.
Two First National Plaza
Chicago, Illinois 60603

COUNSEL FOR THE DELAWARE STATE BOARD OF EDUCATION

James T. McKinstry, Esq.
Richards, Layton & Finger
4072 DuPont Building
Wilmington, Delaware 19899

COUNSEL FOR CLAYMONT SCHOOL DISTRICT AND STANTON SCHOOL DISTRICT

David F. Anderson, Esq.
Potter Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19899

COUNSEL FOR NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT

William Poole, Esq.
Potter Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19899

COUNSEL FOR ALFRED I. DUPONT SCHOOL DISTRICT

John P. Sinclair, Esq.
Potter Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19899

COUNSEL FOR NEWARK SCHOOL DISTRICT

Edward W. Cooch, Jr., Esq.
Cooch and Taylor
601 Market Tower
Wilmington, Delaware 19801

Of Counsel:
Lino A. Graglia, Esq.
3505 Taylors Drive
Austin, Texas 78703

COUNSEL FOR MARSHALLTON-MCKEAN SCHOOL DISTRICT

Richard D. Allen, Esq.
Morris, Nichols, Arsht & Tunnell
American International Building
Twelfth and Market Streets
Wilmington, Delaware 19899

COUNSEL FOR MT. PLEASANT SCHOOL DISTRICT

Jerome O. Herlihy, Esq.
Herlihy & Herlihy
805 Market Tower
Wilmington, Delaware 19801

COUNSEL FOR CONRAD AREA SCHOOL DISTRICT

Louis L. Redding, Esq.
Farmers Bank Building
Tenth and Market Streets
Wilmington, Delaware 19899

Joseph Rosenthal, Esq.
Irving Morris, Esq.
Morris & Rosenthal
101 Market Tower Building
Wilmington, Delaware 19899

COUNSEL FOR APPELLEES

Louis R. Lucas, Esq.
Ratner, Sugarmon, Lucas, Salky & Henderson
525 Commerce Title Building
Memphis, Tennessee 38103

Paul R. Dimond, Esq.
O'Brien, Moran & Dimond
210 East Huron Street
Ann Arbor, Michigan 48104

William L. Taylor, Esq.
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20064

Ms. Aida Waserstein, Esq.
Education Law Center, Inc.
Suite 2100
225 South Fifteenth Street
Philadelphia, Pennsylvania 19102

COUNSEL FOR INTERVENING PLAINTIFF

STATE OF DELAWARE,
Petitioner in No. 78-1743

v.

THE HONORABLE MURRAY M. SCHWARTZ, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF DELAWARE

ON PETITION FOR WRIT OF MANDAMUS

Floyd Abrams, Esq.
80 Pine Street
New York, New York 10005

Special Counsel for the State of Delaware, by appointment of Governor Pierre S. du Pont, IV and Attorney General Richard R. Weir, Jr.

Of Counsel:
Ira J. Dembrow, Esq.
Andrew L. Deutsch, Esq.
Cahill, Gordon & Reindel
New York, New York 10005

Morris, James, Hitchens & Williams

Henry N. Herndon, Jr., Esq.
Edward M. McNally, Esq.
Edward S. Sacks, Esq.
Twelfth and Market Streets
P. O. Box 2306
Wilmington, Delaware 19899

COUNSEL FOR THE NEW CASTLE COUNTY PLANNING BOARD OF EDUCATION

Opinion of the Court

(Filed July 24, 1978)

ALDISERT, *Circuit Judge.*

The consolidated appeals by the Delaware State Board of Education and nine school districts from the district court's ordering of a desegregation plan in the suburban New Castle County public schools require to decide if the district court misused its discretion when it rejected a state-designed plan and adopted another plan designed to remedy constitutionally defective segregated schools in eleven public school districts. *Evans v. Buchanan,* 447 F. Supp. 982 (D. Del. 1978). We conclude that the court did not act improperly and, accordingly, affirm.

I.

Although Delaware state court proceedings addressed this very serious constitutional problem as far back as 1952, this case has continuously commanded the attention of the federal courts—the district court, this court, and the Supreme Court—since 1957. Its history up until 1974 is discussed comprehensively in *Evans v. Buchanan,* 379 F. Supp. 1218, 1220-21 (D. Del. 1974), in which a three-judge court determined that the Wilmington schools which had been *de jure* black schools prior to the Supreme Court's decision in *Brown v. Board of Education,* 347 U. S. 483 (1954) (*Brown I*), continued to remain identifiably black, and that the dual school system in Wilmington had not been eliminated. In a subsequent opinion, the three-judge court found *inter-district, de jure* segregation throughout Northern New Castle County, and ordered submission of both Wilmington-only and inter-district plans to remedy that segregation. *Evans v. Buchanan,*

393 F. Supp. 428 (D. Del. 1975). This judgment was summarily affirmed by the Supreme Court. *Buchanan v. Evans,* 423 U. S. 963 (1975) (three Justices dissenting).

Thereafter, the district court conducted three weeks of evidentiary hearings on remedial plans submitted by the parties, specifically affording appellants the opportunity of demonstrating whether the impact of the inter-district violations was limited. At the conclusion of testimony, the court found that the inter-district violations had "a substantial, not a de minimis, effect on the enrollment patterns of the separate districts," and that racially discriminatory acts of the State and its subdivisions were "a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County." *Evans v. Buchanan,* 416 F. Supp. 328, 339 (D. Del. 1976). Reiterating its finding of *inter-district* violations,[1] the court considered the various submitted plans, finding Wilmington-only plans unacceptable, *id.* at 343-44, and rejecting the specific inter-district remedies proposed by the parties.[2] Rather, on June 15, 1976, the district court ordered that Delaware schools in the area north of the northern line of the Appoquinimink School District[3] be desegregated and reorganized into a new or

1. We establish here only that the remedy which we order may include the suburban districts, because their existence and their actions were part of the violations which lead to the remedy. 416 F. Supp. at 341 n. 43.

2. The latter included plans relying on voluntary transfer inducement ("magnet" plans), 416 F. Supp. at 345-46, and several proposals utilizing cluster and pairing techniques, *id.* at 346-48, which the court determined to be "fraught with complex problems unsuitable for judicial determination" and which would "place the Court in the ongoing position of general supervisor of education in New Castle County." *Id.* at 347.

3. This area is presently comprised of the Alfred I. duPont, Alexis I. duPont, Claymont, Conrad, DeLaWarr, Marshallton-McKean, Mount Pleasant, Newark, New Castle-Gunning Bedford, Stanton, and Wilmington School Districts.

such other new districts as would comply with the court's opinion, which set the date for full compliance with constitutional requirements on all grade levels as September 1978. *Id.* at 361. In ordering reorganization or consolidation of schools districts, the district court placed the laboring oar in developing an acceptable plan squarely in the possession of State authorities. See *id.* at 357.

Certain appellants took an appeal from this order to the Supreme Court which, on November 29, 1976, dismissed the appeal on jurisdictional grounds. 429 U. S. 973 (1976). An appeal to our court followed. We affirmed the basic concept of the remedy ordered by the district court. Our opinion was filed on May 18, 1977, *Evans v. Buchanan*, 555 F. 2d 373 (3d Cir. 1977) (in banc), and the Supreme Court denied *certiorari* on October 3, 1977. 434 U. S. 880 (1977) (three Justices dissenting).

A.

In order to set the stage for our consideration of the present appeal, it is important to emphasize what we did when this case was before us last year. First, we viewed ourselves as precluded by the Supreme Court's summary affirmance of the district court's 1975 order from re-examining the existence of substantial inter-district violations. *See* 555 F. 2d at 377-78. We adhere to the fundamental law of the case principle in the present appeal.[4]

More important for present purposes, we also "affirm[ed] the basic concept of the remedy ordered by the district court." *Id.* at 380. It bears reemphasis that this

4. Although Judges Rosenn, Hunter, and Garth dissented when this case was previously before us on the ground that the inter-district violations had not been identified, 555 F. 2d at 383-86, they believe that our in banc decision is now the law of the case and that institutional integrity requires respect for the rule previously announced by the majority.

basic concept called for "the State Legislature and the State Board of Education [to] take such steps as are not violative of constitutional rights to change the pattern set here," *id.* at 380, *quoting* 416 F. Supp at 357, thus placing the primary responsibility for correcting the violations on the State and not on the district court or a court-created board. We adhere to, and reiterate the fundamental philosophy of this court: court-designed plans, or plans created by a new board were *not* to be effectuated unless the State failed in its responsibility to come forward with an effective solution to the problem. A new board to operate the schools was authorized only on a stand-by basis, "for so long as the State takes no action." *Id.* at 380.

We summarized in our prior opinion, and reiterate now, some basic legal precepts relating to the extent of remedies a federal court may order:

> A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination. This much is settled by *Milliken v. Bradley*, [418 U. S. 717 (1974)]. *See also Spencer v. Kugler*, 404 U. S. 1027, 92 S. Ct. 707, 30 L. Ed. 2d 723 (1972), *affirming* 326 F. Supp. 1235 (D. N. J.); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450. Nor may a remedial desegregation order require "as a matter of substantive constitutional

> right, any particular degree of racial balance or mixing" [. . .] *Swann v. Board of Education, supra,* 402 U. S. at 24, 91 S. Ct. at 1280. . . . [*See also*] *Milliken v. Bradley,* 418 U. S. at 740-41. . . . These are limitations by which a trial court must abide.
>
> The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects. "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Board of Education, supra,* 402 U. S. at 16, 91 S. Ct. at 1276.

555 F. 2d at 379-80.

Subsequent to our 1976 decision, the Supreme Court summarized these *same* precepts in *Dayton Board of Education v. Brinkman,* 423 U. S. 406, 419-20 (1977):

> The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised "only on the basis of a constitutional violation."' [*Milliken v. Bradley*], 418 U. S., at 738, quoting *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16. See *Rizzo v. Goode,* 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' 418 U. S., at 744; *Swann, supra,* at 16." *Id.,* at 293-294. See also *Austin Independent School Dist. v. United States,* 429 U. S. 990, 991 (1976) (POWELL, J., concurring).

B.

Thus when these proceedings were remanded to the district court for the action giving rise to the present appeal, the case had assumed the following jurisprudential posture:

A. The existence and character of substantial interdistrict violations had been adjudicated and were no longer open to review.

B. The geographic scope of the remedy was fixed as all districts north of the northern line of the Appoquinimink School District.

C. We had determined that the district court had not misused its discretion in rejecting certain voluntary plans proposed by appellants to cure the violation.

D. The primary responsibility to fashion a remedy was placed on the State of Delaware, through its legislature or its Board of Education.

E. State authorities were required to file with the district court within 60 days a formal report of their efforts to carry out the mandate of the district court.

II.

Appellants first argue that, after our remand, the district court erred in rejecting the plan submitted by the State Board pursuant to the mandate of this court.

A.

The "plan" submitted by the State Board was included in a report filed July 14, 1977, during the time span between our opinion and the Supreme Court's denial of *certiorari.* Dubbed "reverse volunteerism," the proposal would have required that all Wilmington black students in grades 7 through 12 be assigned to the suburban

districts for the school year 1977-78, and that in subsequent years, grades 1 through 6 be incorporated into the plan. Each student so reassigned, however, would have retained the right to remain in his or her Wilmington school.[5] Presumably, this "plan" was intended to complement state legislation which had been enacted subsequent to the three-judge court's remedy order. Authorizing majority to minority voluntary transfers, this legislation was also offered in the State Board's Report as evidence of the State's compliance with the federal court mandates.[6] The actual "plan" contained in the July 14

5. The proposal was described by the district court as follows:

> As part of this process, attendance zones are to be drawn in the City of Wilmington corresponding to the various suburban districts. In effect, for purposes of pupil assignment, each attendance zone would be part of the suburban district to which the Wilmington students residing therein would be assigned. . . .
>
> As noted earlier, the proposal permits any student to elect to remain at his or her present school. Testimony given at the hearings indicated that for the 1977-78 school year, a student would have between ten and twenty days prior to the opening of school to decide whether to transfer back to his or her Wilmington school. Thus, the choice would have to be made without the benefit of having attended the suburban school, perhaps without even having visited it, and, if assigned to a suburban district with several schools serving the same grade level, without knowing the exact school within the district to which assignment would be made. For those who elect to accept their suburban assignments, they may revoke their choice by submitting a form prior to April 30, 1978. These students would then return to their Wilmington schools for the 1978-79 school year.

Evans v. Buchanan, 435 F. Supp. 832, 838-39 (D. Del. 1977) (footnotes omitted).

6. Delaware law had long provided for voluntary transfers between the Wilmington district and three suburban districts—Alfred I. duPont, Alexis I. duPont and Mount Pleasant—but few transfers had actually taken place because the statute required the approval of both the sending and receiving districts. DEL. CODE tit. ix, § 603. Following the July 15, 1976, remedy order of the three-judge court, the state legislature expanded the right of transfer to include all eleven districts and eliminated the requirement of approval by the

report, however, had not been adopted by the State legislature and had no implementing legislation to support it.

After a week of hearings on the reverse volunteerism plan, on August 5, 1977, in its opinion granting a limited stay pending the Supreme Court's disposition of the petition for *certiorari*, the district court rejected the State Board's proposal. *Evans v. Buchanan*, 435 F. Supp. 832 (D. Del. 1977). After determining that the absence of implementing legislation precluded adoption of the state plan, the court stated, in the alternative:

> Even if this Court were permitted to consider the State Board's proposal, the result in this case would be no different. I find the proposal unacceptable as an equitable remedy for the constitutional violations found by the three-judge court. The most obvious and significant flaw is that the proposal places the entire burden of the remedy on those whose rights have been violated. In formulating a remedy for constitutional violations, this Court must exercise its equitable powers. One would find it difficult to create a more graphic paradigm of an inequitable remedy than one which assigns to those who have been wronged the responsibility of correcting those wrongs. The uncontroverted testimony from State Board of Education personnel adduced at the hearings established that: no white student, suburban or city, would be

6. (Cont'd.)

sending district. 60 Del. Laws, Ch. 486. In 1977 the legislature acted again, this time limiting the restrictions on accepting the transfers and directing the Board of Education affirmatively to promote the concept in all eleven districts. 61 Del. Laws, Ch. 32; 61 Del. Laws, Ch. 67.

The Delaware State Board of Education maintains that "[this] legislative voluntary transfer plan was a response to the order of this Court and the prior order of the three-judge Court." State Appellants' Brief at 10.

> assigned to a different school district, but every black student in Wilmington would be reassigned.

Id. at 840-41. (footnote omitted).

Bolstering these conclusions was the district court's finding regarding the ineffectiveness of the legislative voluntary transfer program:

> For the 1977-78 school year, somewhere between 746 and 1,194 or between approximately 6.6 and 10.5% of the black students from Wilmington have elected to transfer to a suburban district. In addition, 302 black students from DeLaWarr or approximately 17.5% of the DeLaWarr black student population elected to transfer to other suburban districts. In contrast to voluntary transfer of blacks, only 3 white students elected to transfer into Wilmington and none into DeLaWarr.

435 F. Supp. at 837 n. 14 (citations omitted).

B.

As we consider the propriety of the district court's rejection of the State Board's proposal, it is important to recognize that, as a reviewing court, we are not empowered to consider the matter *de novo*. The approval of a desegregation plan is committed to "the exercise of the district judge's discretion . . . [and] a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Board of Education*, 402 U. S. 1, 15-16 (1971). The Supreme Court teaches that the exercise of discretion involves certain functional parameters: "[D]iscretion imports not the court's 'inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles.' Discretion is vested . . . to allow

the most complete achievement of the objectives . . . attainable under the facts and circumstances of the specific case." *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 770-71 (1976), *quoting Albemarle Paper Co. v. Moody*, 429 U. S. 405, 421 (1975). And, as we stated when these proceedings were before us in 1977, "an improper use of discretion exists only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used." 555 F. 2d at 379.

Abiding by these precepts, we reject appellants' argument that the district court misused its discretion in refusing to accept the State Board's reverse volunteerism proposal as a satisfactory response to this court's mandate. The first obvious deficiency is the plan's failure to comport with our specific mandate: in affirming the three-judge court order, we directed that the school districts "be reorganized into a new or such other new districts as shall be prescribed by the state legislature or the State Board of Education," 555 F. 2d at 381, and the State appellants failed to submit *any* plan of mandatory reorganization. Second, the district court properly perceived as an unacceptable difficulty the State's failure to provide State executive or legislative action to implement its proposal. The plan could go into effect only if ordered by a federal court. Third, like its reference to the legislative voluntary transfer plan, in which only three white students took part, the State Board's "plan" carried with it the tacit assumption that only—and that all—black students benefit from transferring to a white environment, and not *vice versa*. The district court properly refused to accept such an untenable assumption. In this regard, the State Board's solution simply failed to meet the standard for voluntary plans set forth in *Green v. County School Board*, 391 U. S. 430,

439 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."

And finally, as stated by the district court, perhaps the most glaring weakness in the State Board's plan is that it would improperly shift the "entire burden of the remedy" onto "those whose rights have been violated." 435 F. Supp. at 840.[7] Precepts of equity lie at the heart of any desegregation remedy, and fairness and justice furnish the fiber and sinew of those precepts. The district court recognized this, and we refuse to fault its judgment in perceiving what it considered to be the basic inequity in the Board's proposal: "One would find it difficult to create a more graphic paradigm of an inequitable remedy than one which assigns to those who have been wronged the responsibility of correcting those wrongs." *Id.* Indeed, neither by brief nor by oral argument have appellants supplied this court with an effective rebuttal to the district court's identification of this, the plan's most basic defect.

7. The district court noted that uncontroverted testimony from State Board of Education personnel established that "no white student, suburban or city, would be assigned to a different school district, but every black student in Wilmington would be reassigned." 435 F. Supp. at 840-41.

Dr. Thomas K. Minter, former Superintendent of Schools of the Wilmington School System, was questioned during the hearings on the State's proposal as to his reaction to this aspect of the plan. Characterizing the plan as "patently discriminatory", he responded as follows:

> I think it's insulting to the parents and to the students of Wilmington because they are again the victims. . . . In undoing the situation, if you put the burden of the remedy on those who have been victimized, it appears to me that the majority society is again putting the burden for—it's almost saying "Go out and heal yourself." . . . [W]hen the burden is equally shared, it seems to me that it recognizes the duty of the total society to rectify a wrong, and not just the victims.

Doc. 596 B at 494-96.

III.

While appellants contest the district court's rejection of the State Board's proposal, they garner their major attack for the plan eventually approved by the district court.

A.

After determining that the State had failed to meet its responsibility to submit a plan "eliminating the dual school system . . . and the vestige effects of de jure segregation," 555 F 2d at 381, the district court, in accordance with the decrees of both the three-judge court and this court, appointed members of a New Board (the "New Castle County Planning Board of Education", or "NCCPBE") to oversee the operation of schools in the relevant area, and to prepare a plan for the operation of unitary desegregated schools. The district court was presented with five plans; two came from the NCCPBE, three from the NCCPBE's Pupil Assignment Committee. Because building capacities vary appreciably among the different school districts,[8] under all plans schoolchildren in the predominantly black areas were reassigned for a greater number of years than their suburban counterparts.

The NCCPBE majority proposal was a "10-2 Concept", under which all students from the two predominantly black districts would be reassigned to the predominantly white districts for ten years, and all students

8. The two predominantly black districts of Wilmington and DeLaWarr contain in the aggregate far less student population and, consequently far less building capacity than the aggregate student population and building capacity of the nine predominantly white districts. Accordingly, plaintiffs accept that under any desegregation plan "black children on the average will be reassigned to [what will be formerly racially identifiable] white schools a greater number of years than white children will be reassigned to [what will be formerly racially identifiable] black schools."

447 F. Supp. at 994, *quoting* Doc. 668 at 7 (footnotes omitted).

from the predominantly white districts would be reassigned to the predominantly black districts for two consecutive years. The court rejected this proposal because, among other reasons, it would "[base] a decision adverse to black students on a grade fraction favorable to black students,[9] reassign only black children in the tender elementary years, and fail to use any of the black high schools as 10-12 grade centers." 447 F. Supp. at 1002.

The NCCPBE minority plan, "Plan W", attempted to increase the number of years that black students would spend in their home districts. Noting that this plan was considered the least attractive alternative by the New Board, the State Board, and the defendant school districts, the district court stated that it "holds scant promise of satisfactory implementation." *Id.* at 1004. Among the plan's perceived weaknesses were its failure to keep students together during the course of their educations to the same degree possible under other plans, and its failure to assign a significant number of students from the predominantly white districts to the predominantly black districts for any amount of time at all.

Finally, the district court was presented by the Pupil Assignment Committee with three distinct 9-3 plans: the "S" configuration, the "IF" configuration, and the "G" concept. The court concluded that the "G" concept was the best of the three:

> Among the several illustrations generated by the Pupil Assignment Committee, the "G" configuration

9. The concept of 10-2 was generated by multiplying the 21.7% figure for black students in the affected area by twelve grades to determine that 2.6 was the number of grades requiring white reassignment in order to produce a "complete mix". Having arrived at a number closer to three than two grades, the New Board arbitrarily chose to assign children from predominantly white districts the lesser number of two years, thereby requiring the reassignment of children from predominantly black districts for ten years rather than nine.

447 F. Supp. at 1002 (footnotes omitted).

> appears superior. The G illustration retains a tight feeder pattern and provides a full grade span in the predominantly black Wilmington district, thus including use of at least one of the Wilmington high schools as a high school. Under the G illustration, when the Wilmington children are assigned back to the city for three years, they necessarily attend a school close to their homes. This feature, apparently afforded children from predominantly white districts under the 10-2 plan, simply ought to be preserved as much as possible. The use of geocodes also permits the possible high school use of both Wilmington high schools should the NCCPBE decide such use to be educationally satisfactory. Further, the increased flexibility under G permits easy modification in the future should adjustments be necessary or desirable. Where the educational patterns of thousands of children are involved, a flexible approach is advantageous; G appears to be such a plan.

Id. at 1005. Ultimately, the court determined that the evidence did indeed demonstrate "sufficient capacity . . . to render feasible a 9-3 plan,"[10] *id.* at 1007, and entered an order directing implementation of the plan by September 1978.

10. Contrasting the 10-2 and 9-3 plans, the court stated:

> Apart from the question of capacity, neither the New Board nor defendants State Board and intervening districts have advanced any reasons why a 9-3 concept ought not to be successfully implemented in the desegregation area. Nor has it been shown that if a capacity problem of minor dimension exists, a slight departure from 9-3 is sufficiently deleterious to justify a wholesale embracing of 10-2. . . .
>
> It is important to realize at the outset that unlike the affected areas in other reported desegregation cases, Northern New Castle County contains no dearth of school spaces. To the contrary, declining enrollments have resulted in a surplus of seats in all districts such that absent any desegregation order

B.

Our focal point in analyzing this remedy is to understand that its purpose is to eradicate the effects of segregation caused by constitutional violations; thus the quantum and quality of the remedy must be designed in accordance with the previous violation determinations.[11]

10. (Cont'd.)
the need to consider closing some schools is abundantly evident. Under the 10-2 assignment plan, severe underutilization of city schools identified the Wilmington schools as ready targets for closing. Under a 9-3 assignment plan, most if not all of the Wilmington and DeLaWarr schools are actively utilized and would probably remain open. In contrast to the devastating impact of the 10-2 plan on the degree of utilization of schools in the predominantly black districts, however, the 9-3 concept contemplates only minor adjustments in the use of the schools in the predominantly white districts, reducing their utilization from a current figure of 70% to 67%.

Id. at 1005-06.

11. A summary of these violations has been suggested as follows:

> [T]he district court identified *eight* separate interdistrict violations, *viz.*, 1. the enactment of [the] Educational Advancement Act of 1968 [EAA], 2. [t]he location of public housing projects, 3. state subsidies for the interdistrict transportation of students attending private schools, 4. the establishment by the Wilmington school board of optional attendance zones, 5. the recordation of deeds containing racially restrictive covenants, 6. portions of the Federal Housing Administration's mortgage underwriting manual, 7. portions of the Delaware Real Estate Commission handbook, and 8. the interdistrict transportation of students attending all-black or all-white schools prior to *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

Evans v. Buchanan, 555 F. 2d at 384 (Garth, J., dissenting) (footnotes omitted).

A more generally phrased, but similarly acceptable, characterization has been made by the district court:

> The court concluded that an interdistrict remedy would be appropriate, based on its findings that:
>
> 1) there had been a failure to alter the historic pattern of interdistrict segregation in Northern New Castle County;
> 2) governmental authorities at the state and local levels were responsible to a significant degree for increasing

Again, we recognize that the formulation of a practical and effective remedy is an undertaking peculiarly within the province of the trial court, and we intend to defer to the court's exercise of remedial discretion if it has applied the proper legal precepts and remained within determined legal boundaries.

With respect to the controlling legal precepts, however, appellants vigorously contend that the district court failed to heed the following instruction from *Dayton Board of Education, supra*:

> The duty of both the District Court and of the Court of Appeals, in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide

11. (Cont'd.)
the disparity in residential and school populations between Wilmington and the suburbs;
3) The City of Wilmington had been unconstitutionally excluded from other school districts by the State Board of Education, pursuant to a withholding of reorganization powers under the Delaware Educational Advancement Act of 1968.

424 F. Supp. at 877 (footnote omitted).

> remedy. *Keyes* [*v. School District No. 1*], 413 U. S. [189,] at 213, 93 S. Ct., at 2699.

433 U. S. at 420. Appellants argue that the failure of the district court to determine the exact amount of "incremental segregative effect" flowing from the violations here rendered the remedy an abuse of discretion. We disagree, concluding instead that *Dayton* involved a factual setting crucially distinct from that here.

The above quotation from *Dayton* reveals that the Court was focusing on a district court's duty where, as it found in *Dayton*, "*mandatory segregation by law has long since ceased.*" The *Dayton* Court specifically noted that racially segregated public schools had been illegal throughout Ohio since 1888. 433 U. S. at 410 n. 4. Delaware's history of public school segregation stands in stark contrast to Ohio's. Until 1954, the law of Delaware *mandated* the separation of the races in the public schools. 379 F. Supp. 1218, 1220 (D. Del. 1974). The three-judge district court in this case specifically found in 1974 "that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system." 379 F. Supp. at 1223. In a subsequent opinion, the three-judge district court found that, at the time of *Brown*, "Wilmington and suburban districts were not meaningfully 'separate and autonomous'" and that "the racial characteristics of city and suburban schools are still interrelated." 393 F. Supp. 428, 437-38 (D. Del. 1975). Furthermore, the court found "(a) a historic arrangement for inter-district segregation within New Castle County [and] (b) significant governmental involvement in inter-district discrimination." 393 F. Supp. at 447.

Thus, in addressing appellants' *Dayton* argument, we are confronted with clear findings of the district court,

first, that the mandatory segregation of the races by the law of Delaware did not cease long ago, and second, that because the dual school system was never dismantled, the consequences of the mandatory segregation of the races in New Castle County have continued up till the present day.

1.

Heeding Chief Justice Burger's reminder that in framing an equitable remedy in a school desegregation case "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution," *Swann, supra,* 402 U. S. at 16-17, we must recognize that the "condition that offends the Constitution" was, as found by the district court, a pervasive *de jure* inter-district segregation throughout Wilmington and the named Northern New Castle County school districts, in which there was significant governmental involvement. Although there have been references to discrete constitutional violations, *see* note 11 *supra,* it is the combined *effect* of all of the separate violations that must be cured by the remedy.

That the "condition that offends the Constitution" was found to be inter-district in nature and extending throughout the eleven-district area required that the remedy be congruent with the affected geographic area. Given the pervasive nature of the condition and the extensive area implicated by the findings of the three-judge court, the court fashioned a remedy that was prima facie reasonable, to-wit, a plan that sought to root out segregative effects in the inter-district area, a plan designed "to extirpate the *de jure* segregation and dual school system in Northern New Castle County", 447 F. Supp. at 985, and to restore the school system to the status it would have enjoyed but for the constitutional violations. In our view, once this

showing was made, the burden passed to the defendant-appellants to demonstrate by evidence and testimony that the proffered plan was "arbitrary, fanciful, or unreasonable," *see Evans v. Buchanan, supra,* 555 F. 2d at 378, by specifying in what respects the reach of the plan exceeded the grasp of the conditions created by constitutional violations. The defendant-appellants failed to meet this burden.

During the three weeks of evidentiary hearings conducted by the three-judge court after the judgment on the violation, during hearings by the district court in July 1977 after remand by this court, and again during additional remedy hearings that began in October 1977, appellants were afforded the opportunity to offer proof that some or all of the remaining segregation that prevailed through the schools of Northern New Castle County was not the product of the substantial inter-district violation found by the three-judge court and, thus, not properly the subject of proposed remedial plans. They failed to come forward with the required evidence to contravene the remedy adopted by the court. Indeed, not only did they not proffer evidence of the extent of the vestigial conditions to show in what respects the remedy swept too broadly, but appellants took the position that it was *impossible* for them to identify the precise vestigial conditions. The State Board's major contention in the proceedings below was: "*It is not feasible to determine what today's situation would be with the school system and the student population in the eleven affected districts 'but for' the alleged constitutional violations.*" Report of the State Board of Education Required by the Opinion and Order of the Circuit Court of Appeals in This Case, at 36-37. (Doc. 548) (emphasis added).

It is true that in many cases the burden of proving the incremental segregative effect of constitutional violations may be properly placed on the plaintiff (*see Dayton Board of Education, supra*), since that showing is normally an element of the plaintiff's case going to remedy. We do not decide here, however, in which cases the burden shifts to the defendant and in which it does not. We hold that, in a case such as this, where there is an historical pattern of significant *de jure* segregation with pervasive inter-district effects, where a facially reasonable plan is proposed to remedy those effects, where the defendant itself admits that it is not feasible to separate out the incremental segregative effects of the constitutional violations from the segregative effects of demographic changes, where the defendant itself is in the best position to ascertain what the pattern of segregation would have been "but for" the constitutional violations, and where the defendant has dragged its heels and obstructed progress toward desegregation for twenty-six years, then the burden of proof shifts to the defendant. Thus the *defendant,* if it opposes the remedy put forward by the plaintiff or the district court, must show the incremental segregative effects of the constitutional violations, and must show how the proposed remedy goes beyond that incremental impact. To hold otherwise would be tantamount to holding that the plaintiffs are without remedy.

2.

Although recognition of our proper appellate role in reviewing the exercise of discretion by itself compels our conclusion that appellants did not meet their burden of proof, previous Supreme Court teachings on burdens of proof in various phases of school desegregation cases offer additional support. A line of important school cases

strongly suggests that it was the burden of the defendant school boards here to go forward with evidence to challenge the propriety of a proposed remedy. For example, in *Green v. County School Board, supra,* 391 U. S. at 439, the Court stated pointedly that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." And in *Swann, supra,* 402 U. S. at 26, the Court advised that "the burden upon the school authorities will be to satisfy the court that [their schools'] racial composition is not the result of present or past discriminatory action on their part."

The circumstances best approximating those of the present case are found in *Keyes v. School District No. 1,* 413 U. S. 189 (1973), in which segregative practices within one section of the City of Denver were said to have produced segregative effects in other sections. The Supreme Court stated that "if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools." *Id.* at 211. Moreover, "after past intentional actions resulting in segregation have been established[,] the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions." *Id.* at n. 17. *Keyes* also holds that a finding of intentional segregation "in a meaningful portion of a school system . . . creates a presumption that the other segregated schooling within the system is not adventitious." *Id.* at 208. And, extremely significant for our purposes, the Court stated:

> [W]here a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

The *Keyes* Court relied on considerations of "policy and fairness based on experience in the different situations" in deciding when to shift the burden of proof. 412 U. S. at 209. Considerations of "policy and fairness" make it even clearer here than in *Keyes* that the burden should be on defendants. In *Keyes,* a violation had been found only in a limited geographical area and, as a result, the burden was placed on the defendants to prove that the racial disparity in other areas was not also the product of constitutional violations. Here, we have a finding that governmental activity was a significant cause of discrimination *throughout the inter-district area.*

Appellants cannot, consistent with the guidance of *Keyes,* argue on the one hand that the remedy approved by the district court covered conditions which are not effects of *de jure* segregation and on the other hand contend that it is not feasible to determine precisely what "today's situation would be . . . 'but for' the alleged constitutional violations." Not only does this avoid their established burden, but the logical extension of the argument is untenable—that no possible remedy can be formulated in this case. Desegregation remedies being drawn from the heart of equity, no court could be so callous as to accept the contention that although vestiges of *de jure* discrimination pervade to this day, it is helpless to fashion a remedy to root them out.

3.

Apart from our concern that appellants' misperception of "burdens" be corrected, we agree with the district court

that appellants' *Dayton* argument is "a belated attempt to relitigate an issue already conclusively resolved in this case, with all right of appeal exhausted." 447 F. Supp. at 1009. First, to the extent that *Dayton* requires detailed findings of fact and reasoned statements of law regarding the constitutional violations which exist, the numerous prior opinions involved in this litigation more than adequately predicted and satisfied those requirements. *See, e.g.*, 393 F. Supp. at 432-38; 416 F. Supp. at 341 (district court specifically recognized its "duty . . . to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred"), *aff'd*, 555 F. 2d 373 (3d Cir. 1977). Second, we agree that whatever its general relevance be, *Dayton* is so factually distinct from the present litigation as to circumscribe detailed analogy. Not the least of the differences between the two cases is that the system-wide remedy eventually disapproved in *Dayton* rested on three "relatively isolated" violations that could be deemed "of questionable validity." 433 U. S. at 413. And finally, the unavoidable distinction is that prior to *Brown I*, in New Castle County, Delaware, *desegregation* was unlawful under Delaware law; in Dayton, Ohio, *segregation* was unlawful under Ohio law. This difference between the two states is, at base, the difference between the two cases.

C.

That the primary responsibility to devise a suitable plan was and is that of the State of Delaware, and not the federal courts, and that appellants' *Dayton* argument is more properly directed toward their own failure of proof, should not come as any surprise to appellants. As early as 1952, in a predecessor action to the present proceedings, the Delaware Supreme Court ordered the immediate admission of black children to certain schools previously attended only by white children because, historically, Delaware had required its public school students to attend segregated schools. *Gebhart v. Belton*, 91 A. 2d 137 (Del. S. Ct. 1952). On appeal to the Supreme Court, the *Gebhart* case was consolidated with other cases and affirmed by the Supreme Court in *Brown v. Board of Education*, 347 U. S. 483 (1954) (*Brown I*), again affirmed in *Brown v. Board of Education*, 349 U. S. 294 (1955) (*Brown II*), and remanded to the Supreme Court of Delaware for further proceedings to require "a prompt and reasonable start toward full compliance" with *Brown I* and "to effectuate a transition to a racially nondiscriminatory school system." 349 U. S. at 300-01.

We set forth this history here to emphasize the length of time the State of Delaware has been directed by judicial decrees to fashion a remedy to eliminate the vestiges of *de jure* segregation. We are in fact emphasizing two faces of the same coin: that the present case results from statutorily mandated *de jure* segregation, not from isolated acts of state authority, or from what is sometimes called *de facto* segregation; and that State authorities have been made aware of their responsibilities by state and federal courts for some twenty-six years. This emphasis bears repetition because of the persistent attempts by appellants to have the federal courts re-examine the findings of constitutional violations in New Castle County, Delaware, the latest effort being to argue, albeit indirectly, that the decision in *Dayton* commands a different result. For the foregoing reasons, we disagree that *Dayton* alters the law in this case.

IV.

In addition to addressing a pupil reassignment plan, the district court's opinion and order instructed the New Board to implement guidelines which the court delineated

in eight areas of ancillary relief: in-service training; reading and communications skills; curriculum; counseling and guidance; school building construction, site selection, and use of existing schools; recognition of human values; standards of conduct; and staff.

We note at the outset that there is no serious dispute as to the validity, and even the necessity, of such substantive programs.[12] Indeed, after a scrupulous review of the lengthy record compiled before the district court, we are impressed that no party ever seriously contested or controverted the value of programs testified to by numerous witnesses. The State appellants [13] nevertheless challenge the district court's authority to order such relief, urging that "[n]o claim has ever been made that the [present] educational offerings in any of the affected districts in the areas of reading, guidance, human relations or the like were constitutionally suspect or infected with discriminatory bias." State Appellants' Brief at 26. The underpinnings of their discontent are twofold: first, they offer a

12. The State Board of Education generally does not dispute the proposition that compensatory programs such as those imposed by the [district court] can be of assistance in the desegregation process.

State Appellants' Brief at 27.

[T]he evidence which plaintiffs offered consisted of the opinions of educators that the enriched educational offerings sought would be educationally desirable in the context of converting from eleven separate school districts to a single desegregated district or that such matters should not be ignored in the process of effecting that conversion. It is to be doubted whether any professional educator would ever opine to the contrary . . . .

State Appellants' Reply Brief at 27-28.

13. *Only* the State appellants challenge the propriety of the ancillary relief on appeal. The State Board contends that the suburban districts lack standing to agree or disagree with the programs, since these districts will cease to exist under the court's order. In view of our rejection of the State Board's claims, we need not resolve the question of standing.

varying interpretation of the guiding legal precept, *Milliken v. Bradley,* 433 U. S. 267 (1977) (*Milliken II*), and second, they question whether a court should order such remedies, contending that a school board should exercise complete autonomy in this area.

For the following reasons, we believe that the law is settled that the district court may, and in these circumstances, properly did, order ancillary relief.

A.

The legal focal point in an analysis of the propriety of ancillary relief must be *Milliken II*, supra, a recent Supreme Court case which offers strong support for the concept. Addressing the question whether a district court can, as an adjunct to a desegregation decree, order remedial educational programs for children who have been subjected to past acts of *de jure* segregation, the Court stated the "basic rule" that "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." 433 U. S. at 279-80, *quoting Brown II, supra,* 349 U. S. at 300.

The specific ancillary programs challenged in *Milliken II* were in-service training for teachers and administrators, guidance and counseling programs, revised testing procedures, and a remedial reading and communications skills program. These programs, along with numerous others, were originally suggested by the Detroit School Board and were the subject of extensive hearings before the district court. "Substantial testimony was adduced with respect to the proposed educational components, including testimony by petitioners' expert witnesses." 433 U. S. at 274. Petitioners nevertheless claimed that the district court's order exceeded the scope of the constitutional violation, *i.e.,* the unlawful segregation of students on the

basis of race, contending that any remedial decree was limited by the scope of this violation to remedying only unlawful pupil assignment. Rejecting this contention, the *Milliken II* Court stated:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena Bd. of Education v. Spangler,* 427 U. S. 424 (1976), or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I, supra. Hills v. Gautreaux,* 425 U. S. 284, 292-296 (1976). But where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the "'*condition* that offends the Constitution.'" *Milliken I, supra,* at 738. (Emphasis supplied.)

The "condition" offending the Constitution is Detroit's *de jure* segregated school system, which was so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations by both state and local officials.

. . . .

> In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual school system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.

Id. at 281-83.

After discussing a "pattern" of federal court decisions ordering ancillary relief over the past decade,[14] the Court concluded that "[*p*]*upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures*". *Id.* at 287-88 (emphasis added). We consider such advice formidable legal support for the ancillary relief ordered in the present case. Nevertheless, although appellants' argument appears to be, at bottom, the same as that of petitioners in *Milliken II*—that the remedial order exceeds the scope of the constitutional violations—appellants contend that a critical differ-

14. 433 U. S. at 283-86. While the Court indicated that its reference to these cases was not necessarily tantamount to approval of their holdings, the cases were used to "demonstrate that the District Court in the case now before us did not break new ground . . ." *Id.* at 286-87.

State appellants call our attention to a Tenth Circuit case in which the court *declined* to approve the district court's order of both an ancillary bicultural-bilingual education plan and a consolidation of two schools into a campus complex. *Keyes v. School District No. 1, Denver, Colorado,* 521 F. 2d 465 (10th Cir. 1975), *cert. denied,* 423 U. S. 1066 (1976), came down before the Supreme Court indicated its strong support for ancillary relief in *Milliken II*. More important, the *Keyes* court was presented with problems which are not relevant to our situation. As to the bilingual program, it stated that "the court's order would impose upon school authorities a pervasive and detailed system", 521 F. 2d at 482; as to the consolidation plan, it stated that "the [district] court appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution", *id.* at 483. As discussed more thoroughly below, we believe that the district court in the present case allowed maximum room for local authorities to contrive and implement their own programs, and that the court did not impose is own views of what is "good" in the educational context in the absence of record evidence.

ence between *Milliken II* and the present case is that in the former there was an express finding that the educational components at issue "were infected with the discriminatory bias of a segregated school system." *Id.* at 275. Indeed, the heart of appellants' challenge is their contention that there were no findings of discrimination in Delaware's present educational offerings.

First and foremost, we are not persuaded that *Milliken II* dictates that there be a finding that *each* remedial program be "infected with the discriminatory bias of a segregated school system." *Id.* In fact, this finding was made as to only two of the four challenged programs in *Milliken II*. *See id.* at 274-75. To read a general prescription into a decision which itself did not follow that purported prescription is a path we cannot follow. Further, there is an important practical reason that there cannot be such a finding for each remedial program—many of them will not, and indeed cannot, come into existence until a desegregation plan is implemented. For example, program in the areas of human relations, in-service training, and special counseling are intended to help students, parents, and faculty deal with the various pressures which arise *as a result of desegregation.* It would be logical fallacy to require findings of discrimination for programs which do not yet exist. That current programs, extraneous to the desegregation plan, are sufficient to meet other needs and may or may not be discriminatory, is simply irrelevant.

Finally, we note a troubling consistency between appellants' position on the ancillary relief issue and their position on who is to bear the burden of showing that the major relief ordered comports with the constitutional violations found. The plain fact is that the State never submitted any ancillary plans which would help students cope with the process of desegregation, even though much evidence had been presented that such plans were necessary.

We believe that the incisive authority of *Milliken II*, the testimony presented in hearings before the district court, and the absence of objection to, or contradiction of, that testimony combine to indicate the critical importance of ancillary relief in this case.

Indeed, the district court specifically found that it is "amply supported and undisputed on the record" that "ancillary remedial relief is necessary and essential to accomplish the transition to unitary racially nondiscriminatory schooling and to overcome the vestige effects of *de jure* segregation in Northern New Castle County." 447 F. Supp. at 1014. It viewed the prescribed programs as "necessary to cure the constitutional infirmity and restore the victims of discrimination as nearly as possible to the position they would have assumed in the absence of a violation." *Id.* at 1017. These conclusions, if borne out in the record, are important indications that the guidance of *Milliken II* was considered and abided by

B.

Having determined that the district court could properly order ancillary relief, our function in this area devolves largely to the inquiry whether there exists adequate record support for the various concepts.[15] We are bound to uphold them if we find, as did the *Milliken II* Court, that "the decree before us was aptly tailored to remedy the *consequences* of the constitutional violation." 433 U. S. at 287

15. Initially, we note that we are unimpressed with appellants' characterization of the evidence relied upon by the district court as "*merely* . . . the statements of educators that the programs in question were matters of legitimate concern and were educationally desirable in the desegregation process." State Appellants' Brief at 26-27 (emphasis added). The educators included local administrators and nationally known desegregation experts, all of whom were in some way intimately knowledgeable of the situation in the Delaware school system. The *Milliken II* Court had no difficulty in crediting similar testimony. *See* 433 U. S. at 273, 273-74 n. 9.

(emphasis added). It is important to note one rather obvious "consequence" of the constitutional violations here: in September of this year, a comprehensive desegregation plan will be put into effect in the school system of New Castle County. Those "consequences" which are the self-evident problems arising from the *de jure* segregation of students are addressed, in large part, by the pupil reassignment plan. But other "consequences" of the constitutional violation, no less important, will arise by virtue of the desegregation itself. Again, it is only after a pupil reassignment plan has been put into operation that these programs may become an adjunct to, and assist in, the plan's effective implementation.

We shall address the various programs *seriatim*, but we consider first State appellants' apparent concern that in ordering the ancillary relief programs, the district court co-opted an area better left to local and State administrators. *Milliken II* warned that "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution", 433 U. S. at 280-81, but it also stated quite clearly that "[i]f . . . 'school authorities fail in their affirmative obligations . . . judicial authority may be invoked.'" *Id.* at 281, *quoting Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971). At no time did the State indicate that it would or could contrive the necessary ancillary programs. Simply put, we are hard pressed to see how state appellants can now invoke precepts of local autonomy when they failed to grasp their own opportunity to act in this regard. Under the circumstances, judicial authority was properly utilized. Characterizing its orders as "guidelines", the district court stated that "[t]he precise development and actual implementation of remedial relief is left to the discretion of educational authorities." 447 F. Supp. at 1015. *See also id.* at

1000. In that context, we undertake the task of evaluating the record evidence supporting the various programs.

1.

In-service training. In-service training programs help to prepare the staffs of schools which will be receiving new students to cope with the special problems which arise as a result of the reassignment process. The district court's conclusion that "[a]dministrators, faculty, and other staff require orientation and training for desegregation," *id.* at 1015, was supported by ample testimony from local administrators and nationally-known desegregation experts. For example, Dr. George V. Kirk, Superintendent of Schools in the Newark School District, testified that in "every meeting I've attended anywhere where desegregation has been attempted and where it has been successful, it is felt that [it is a] critical requiremen[t] for any plan to have good in-service programs underway for teachers, administrators and staff, even the cafeteria staff." Doc. 663 at A193-94.[16] Dr. Raymond O. Shelton, Superintendent of Schools in Hillsboro County, Tampa, Florida, stated that Tampa's in-service training program helped ameliorate problems "because some of [the staff] would be facing black youngsters for the first time and some of the black teachers would be facing white youngsters for the first time." Doc. 663a at B25. Numerous other experts testified to the need for in-service training, *see, e.g.*, Doc. 596B at 529 (Dr. Thomas K. Minter, former Superintendent of Schools in Wilmington, testifying how staff can alleviate problems caused by transferring students); Doc. 596C at 725 *et seq.* (Dr. Gordon Foster, Professor in the School of

16. Dr. Kirk later added that there is a "tremendous need" for in-service preparation, "particularly in an area like this where there are eleven separate districts, where many of these teachers have never worked together . . . ." Doc. 663B at Ba 78.

Education at the University of Miami, and Director of the Florida School Desegregation Consulting Center, explains form and purpose of in-service training); PX 6 at 32 and Doc. 663J at I16, I39-41, I128-29 (Dr. Joseph E. Johnson, Superintendent of Schools in Wilmington); Doc. 663P at N11-13 (Dr. James B. Pugh, Superintendent of the Alexis I. duPont School District), and gave their personal opinion that the situation in Delaware warrants such a program. *See, e.g.*, Doc. 663B at Ba78 and Doc. 663C at 203 (Dr. Kirk); Doc. 663P at N60 (Dr. Donald L. Farrar, Alfred I. duPont School District's Director of Elementary Education: "I think a change as drastic as desegregation would require a great deal of in-service activity."); Doc. 663P at 30 (Dr. Pugh).

2.

Reading and Communications Skills. Focusing on the guidance of *Milliken II* that "speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school[;] [t]he root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task", 433 U. S. at 288, the district court determined that there was sufficient record evidence here to direct the New Board "to institute an affirmative reading and communication skills program which does not resegregate pupils." 447 F. Supp. at 1015-16. Plaintiffs' Exhibit 6, which was written under the supervision of Dr. Joseph E. Johnson, Superintendent of Schools in Wilmington, explained the necessity of such a program:

> There is probably no educational component more directly associated with the process of desegregation than reading and communication skills. Children who have been educationally and culturally set apart from the larger community by the effects flowing from the longstanding interdistrict violation will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits and reading skills, for example, which vary from the environment in which they must ultimately function and compete if they are to enter and be a part of that community. This is not peculiar to race; it can affect any children who, as a group, are isolated from the main stream.

PX6 at 32-33. In his oral testimony discussing this exhibit, Dr. Johnson was asked what is necessary to implement an effective desegregation plan; he responded, in part, "I feel that there is very definitely a need . . . to look at the reading and communication skills of the individuals . . . ." Doc. 663J at I16. Further testimony regarding the general necessity of such a program came from both Dr. Foster, *see* Doc. 596C at 785-86, and Dr. Kirk. *See* Doc. 663C at pp. 204-06.

3.

Curriculum. Holding that "curriculum offerings and programs must preserve respect for the racial and ethnic backgrounds of all students," the district court directed that "instructional materials, texts, and other curriculum aids should be free of racial bias" and instructed the New Board to "provide curriculum offerings and programs which emphasize and reflect the cultural pluralism of the students." 447 F. Supp. at 1016. There was testimony that it is necessary "to re-assess or assess the instructional program to determine the needs for a changing pupil population. . . ." Doc. 663P at N14 (Dr. Pugh). And in his testimony, Dr. Kirk agreed that it is vital to evaluate and attempt to make a curriculum racially nondiscriminatory,

Doc. 663E at 89, and that "materials on the values of various groups and cultures in the group and cultures well beyond the group ought to be available to the young people." Doc. 663C at 206. *See also* PX6 at 33-34; Doc. 663J at I16 (Dr. Johnson).

4.

Counseling and Guidance. The district court instructed that "to ameliorate the racial pressures on students undergoing desegregation and to prevent resegregation under the guise of curriculum or program choices, the NCCPBE must institute an effective and nondiscriminatory guidance program." 447 F. Supp. at 1016. Ample testimony described the various pressures to which reassigned students are subjected, *see e.g.*, Doc. 596A at 274-77, 299-301 (Dr. Kenneth E. Madden, State Superintendent of Public Instruction); Doc. 596A at 526-29 (Dr. Minter), as well as the clashes which can arise as a result of these pressures. *See* Doc. 663A at B25 (Dr. Shelton: "[Y]ou are putting black and white youngsters together that had never been to school together before . . . there is a lot of understanding that needs to take place"). Dr. Kirk identified this area as "critical" to the "successful working of a desegregation plan to avoid the kinds of conflicts and problems that sometimes arise". Doc. 663 at A197. *See also* Doc. 596C at 786-87 (Dr. Foster); Doc. 663C at 206-07 (Dr. Kirk); PX6 at 34 and Doc. 663J at 16 (Dr. Johnson).

5.

Selection of School Sites, Construction of New Buildings, Expansion of Existing Facilities, and Closing of School Buildings. As we have previously noted, regard for the existing physical capacities of the various school districts was of prime importance in the formulation of pupil re-

assignment plans. Of equally obvious importance is the nondiscriminatory maintenance or alteration in those capacities during the transition to one unified school district. Thus, the district court directed the New Board to "establish and enforce nondiscriminatory guidelines for new construction, review of building needs, and the appropriateness of each proposed building project or school closing." 447 F. Supp. at 1016. Various witnesses indicated that this area is critical to the successful implementation of the desegregation plan, *see, e.g.*, Doc. 663C at 207 (Dr. Kirk); PX6 at 34-35 and Doc. 663J at 16 (Dr. Johnson), and testimony adduced at the hearings indicated that it is necessary to establish guidelines for an orderly and nondiscriminatory effectuation of these projects. *See, e.g.*, Doc. 695S at 76 *et seq.; see also* PX 5 (admitted over objection) (in letter to Dr. Carroll W. Biggs, Superintendent of the Alfred I. duPont School District, Dr. Foster suggests that one necessary criterion for a desegregation plan is the "[e]quitable or proportionate burden for all racial or ethnic groups in such matters as closing schools . . . [and] selection of schools. . . .")

6.

Human Relations Program. The district court directed the New Board to "provide an appropriate human relations program throughout the unitary school system in order to protect the individual dignity of students and teachers and to prevent racial myths and stereotypes from prevailing in schools undergoing desegregation." 447 F. Supp. at 1016. The existence of racial "myths" and "stereotypes" were mentioned at numerous points during the hearings, *see, e.g.*, Doc. 596C at 786 (Dr. Foster); Doc. 663A at B25 (Dr. Shelton), and various administrators testified as to their own successful experience with similar programs. For example, in describing Tampa's experience, Dr. Shelton

said "[y]oungsters could get together and stand over here and stand there and refuse to go to class, or something, and the human relations people would get them back in class." Doc. 663A at 28. *See also* Doc. 663P at N33 (Dr. Pugh); Doc. 663C at 208 (Dr. Kirk: "[H]uman relations programs are an essential part of a desegregation process."); PX6 at 38.

7.

Standards of Conduct. The district court directed the New Board "to develop a code of rights and responsibilities regarding such issues as student conduct and suspension and expulsion, and to insure administration of the code in an unbiased manner." 447 F. Supp. at 1016-17. The necessity of this program is poignantly illustrated in a remark by Dr. Kirk: "[O]ne of the things that seems to occur in the process of desegregation is the feeling on the part of both black and white youngsters that someone is being treated unfairly or someone is being given special conditions." Doc. 663C at 208; *see also id.* at 208-10. Other witnesses testified similarly to the relevance of such a program. *See, e.g.*, Doc. 663P at N62 (Dr. Farrar); *see also* PX 6 at 38-39.

8.

Racial Composition of Staff. In this area, the district court stated:

> [I]ndependent of student assignment, the additional record [17] made at hearings conducted after issuance of the primary remedial decree demonstrates that

17. In a footnote here, the district court noted that the three-judge court had previously stated that it has "no figures in the record to indicate whether there is a substantial disparity in racial makeup of existing staffs." 447 F. Supp. at 1017 n. 148, *citing* 416 F. Supp. at 359.

> racial identity of schools can be perceived solely by reference to the racial composition of staff and existing staffs manifest substantial disparity in racial make-up. *See, e.g.*, PX 18;[18] *compare Swann*, 402 U. S. at 18. The New Board must reassign faculty, administrative, and other staff personnel in the course of eliminating the dual school system and the vestige effects of inter-district *de jure* segregation in order to insure that schools do not retain their former racial identity through racially identifiable faculty and staff assignments.

447 F. Supp. at 1017. The passage from *Swann* quoted by the district court offers clear support for its order in this regard. Stating that "policy and practice with regard to faculty [and] staff . . . [are] among the most important indicia of a segregated system," the *Swann* Court held that "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U. S. at 18. It bears particular note that the *Swann* Court rejected the contention that "the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation." *Id.* at 19.

Thus, based upon the record evidence that the "racial identity of schools can be perceived solely by reference to the racial composition of [their] staff[s]," 447 F. Supp. at 1017, we are bound by the teachings of *Swann* to uphold this part of the order. Moreover, even taking the district court's language merely as an indication that the

18. *See also* Doc. 663J at I4-5; Doc. 663H at 208-16.

record has now been made more whole on the subject of staff employment,[19] we would affirm this guideline on the basis that ample testimony was adduced during the hearings which indicated a critical necessity for reassigned schoolchildren to have role models at their new schools. For example, Dr. Johnson testified:

> [T]he fact that individuals with—minority individuals—who are successful in their field, who have the ability to master certain subject areas, [can come] into a school to give individuals new perceptions of what another race can do and how they can teach . . . I would characterize that as positive.
>
> . . . .
>
> I would favor a concept that I think would be educationally sound and needed to have a smooth implementation of the desegregation plans, and that is for those youngsters who move into new situations [to] have role models that are of the same racial and ethnic background as they are . . . .

Doc. 663J at I124; Doc. 663L at K125. *See also* Doc. 596B at 502 *et seq.* (Dr. Minter); Doc. 663C at 139, 209-31 (Dr. Kirk); PX6 at 39-41.

C.

To sum up, we believe that in ordering ancillary relief as an adjunct to the pupil reassignment plan, the district court exercised an informed discretion. Each area of relief ordered was well-supported in the record, and the evidence of its value and necessity in the implementation of a successful desegregation plan in Northern New Castle County remains, even at this juncture, uncontroverted by the State appellants.

19. We note that the district court rejected appellees' proposed inclusion of two additional provisions, "one requiring review of past hiring and promotion policies of the existing districts and appropriate actions to overcome the continuing effects of any past discrimination, and the other prohibiting any decrease in the percentage of minority employees . . . ." 447 F. Supp. at 1017 n. 149.

V.

The Alexis I. duPont School District argues separately that it should not be included in the new plan. Its contention is based on the present racial composition of its schools: the school population is generally 78.5% white and 19.4% black in New Castle County, and as of September 1977, the Alexis I. duPont School District consisted of 78.38% white students and 19.23% black. Thus Alexis I. argues that it is now fully desegregated, that it need not be included in the plan, and that the district court erred by denying its motion to be excluded. On review our standard is the same as it is in the chief appeals—a review of the district court's discretion. We find no misuse and accordingly will not disturb the ruling. This particular district is a portion of a larger geographic area determined by the three-judge court to be the subject of a substantial, longstanding inter-district violation. As stated earlier, *see* Part I *supra*, the previous decision of this court determined that the geographic scope of the remedy was to include all the districts in Northern New Castle County except the district of Appoquinimink. That during a given month a discrete portion of this area—the Alexis I. duPont School District—exhibited a changed statistical profile by virtue of a voluntary effort is no guarantee that Alexis I's student population will remain the same. At any event, this in itself is insufficient reason for us to conclude that the district court misused its discretion, faced as it was with the prior inclusion of Alexis I. in the area to be reorganized.

VI.

Finally, we turn to that part of the remedy that provides for local taxation. This is a most troublesome aspect of the district court's disposition of this case, in which a uniform tax rate was established to be applied throughout the desegregation area in order to "eradicate existing disparities and resultant inequities between present districts." 447 F. 2d at 1025. The district court conferred on the New Castle County Planning Board of Education the authority to establish, levy and collect taxes for the current operating expenditures up to a maximum authorized rate of $1.91 per $100 of assessed property valuation. *Id.* at 1033. It indicated, however, that the Delaware Legislature could raise or lower this tax authorization as long as the rate was not lowered "below a generally acceptable rate to a point at which the desegregation process would be imperiled. . . ." *Id.* at 1026. Moreover, the court permitted the New Board to set a tax rate of up to $.32 for tuition, debt service, and minor capital improvements. *Id.* at 1027.[20]

Acknowledging the sensitivity of its actions, the district court commented:

> Authorization to set a school tax rate is properly a product of the political process. For that reason, it is my view a federal court should not become involved failing a total abdication of responsibility over a period of time such that further delay significantly jeopardizes constitutional rights. . . .

20. In a subsequent clarification of its January 9th opinion and order, the district court limited the operation of the maximum rates in these three areas to the fiscal year beginning July 1, 1978. Thereafter, the NCCPBE was authorized to set the rates. *See Evans v. Buchanan*, Nos. 1816-22 (D. Del. Jan. 20, 1978), Slip Opinion at 4.

> . . . [T]he luxury of further delay comes at the cost of endangering an orderly transition to a racially nondiscriminatory unitary school system. . . .
>
> It is with deep seated reluctance overcome only by the pressing, immediate necessity and the realization that no other option is available to fill the legislative void that the Court becomes involved at all in matters of taxation. Were it not true that the desegregation process faces imminent peril unaddressed by any other practical alternative, the federal court would not intrude. If the political process had provided statutory machinery or a procedure for devising a tax rate for the single district, or if there were not an immediate need to act now, I would further defer the matter of local tax rate authorization.
>
> The Court is compelled, however, to order that a tax rate be established. This action is taken with the understanding that the Legislature can alter the parameters authorized. Because state political processes are preferred over even limited intervention by a federal court, the Delaware Legislature may raise or lower the tax authorization established here. The Court must caution, however, that any legislative action that lowers the established tax rate below a generally acceptable rate to a point at which the desegregation process would be imperiled will be received skeptically. *Given the historical stance of the Legislature, if such a lowering occurs, the usual presumption of legislative regularity will not attach.* If, as an alternative, the Delaware Legislature makes provision for replacement of the authorized revenue lost through reduced local school tax rates, the local school tax rate can be lowered to any level or even eliminated.

447 F. Supp. at 1025-26 (footnotes omitted) (emphasis added).

Pursuant to the district court's instructions, the NCCPBE on February 23, 1978, established a tax rate for current operating expenses of $1.68, a rate to be described in the district court's May 5, 1978, Opinion as "within the guidelines sanctioned by the Court's order." May 5 Slip Opinion at 5. At about the same time, however, the Delaware General Assembly passed, and Governor Pierre S. du Pont IV signed into law, Senate Bills 456 and 457; S. B. 456 "directed the State Board of Education to devise an alternative plan of governance," and S. B. 457 directed the State Board to set a maximum tax rate for each new school district so devised. On March 16, 1978, the district court enjoined the implementation of a four-district plan contrived as a result of S. B. 456,[21] and shortly thereafter, the State Board calculated a tax ceiling for the single district at a rate lower than that established by the NCCPBE. Eventually set at $1.585, or 9½ cents lower than the NCCPBE's rate, the State Board's rate would yield expected revenues roughly $2.5 million less than the $1.68 rate.[22] *See* May 5 Slip Opinion at 32.[23]

21. In its May 5th opinion, the district court explained that the four-district plan "conflicted with the January 9, 1978 order of the Court," May 5 Slip Opinion at 5, a characterization "reluctantly conceded by representatives of the State defendants." *Evans v. Buchanan*, Nos. 1816-1822 (D. Del., June 22, 1978), Slip Opinion at 8. The injunction is not contested here.

22. The district court has summarized the procedure by which S. B. 457 authorized the State Board to calculate a tax rate as follows:

> The legislation directs the State Board to: (1) estimate fiscal 1978 current expenditures; (2) divide this figure by the number of students enrolled for fiscal year 1978 to calculate a current average per pupil expenditure; (3) multiply the average expenditure total by the number of students expected to attend in fiscal 1978 to establish an estimated expenditure required for fiscal year 1979; (4) using the current total assessed value of taxable real estate establish a tax that would yield 110% of the 1979 estimated expenditure. Although providing that the 110% amount so obtained included delinquencies and the

In light of the variance in tax rates, the State Board applied to the district court for an injunction to permanently enjoin the NCCPBE from fixing, levying or collecting a local tax for current operating expenses in excess of that established under State law. After a three-day hearing and the submission of post-trial briefs by various parties, the district court on May 5, 1978, denied the injunction on the ground that S. B. 457 as implemented by the State Board provided "a taxation scheme likely to frustrate or imperil the desegregation process in the single school district." May 5 Slip Opinion at 2.[24] The State of

22 (Cont'd)

> costs of collection, the statute is silent on whether the 10% is also intended to cover the costs of reorganization and desegregation or is simply an inflation factor reflecting the historic percentage of increase in total expenditure. Finally, the statute provides that the Board of Education (NCCPBE) rather than the State Board may set the tax rate for debt service, minor capital expenditure and tuition.

May 5 Slip Opinon at 10-11.

23. The State Board represented that its tax rate will yield $39,873,626; the court noted that assuming the historical collection rate of 98.5%, a tax of $1.585 will actually yield $39,275,251. *Id.* at 18-19.

24. The district court offered the following reasons why "the desegregation plan . . . [would] be imperiled by reason of the $1.585 current expense tax rate":

> (1) Based upon historic levels of local support, the yield available for public education in the desegregation area from the $1.585 tax rate is less than the projected total aggregate local expenditure for school children which would have been made by the eleven component districts in the absence of reorganization and desegregation; (2) No provision was made for local current operating tax revenue to enable the NCCPBE to meet essential expenses incidental to reorganization and desegregation; (3) S. B. 457 as construed and as procedurally presented in the form of a motion for permanent injunction by the State Board would establish for all practical purposes the $1.585 limit in perpetuity notwithstanding that inflation is a fact of life and an outstanding January 9, 1978 order of this Court requires the NCCPBE to pay fifty percent of the costs of desegregation commencing in fiscal year 1980 and increasing ten

Delaware sought immediate relief in this court by filing a petition for mandamus directing the district court to vacate its order of May 5, 1978, and to enter the injunction requested by the State Board. Because the subject matter of the mandamus petition implicates a critical issue of this appeal, we have consolidated the mandamus request with the appeals already before us.

A.

"Courts of appeals, pursuant to their supervisory powers, may review in a mandamus proceeding questions of unusual importance necessary to the economical and effective administration of justice. *Schlagenhauf v. Holder,* 379 U. S. 104 [, 109-12] (1964); *La Buy v. Howes Leather Co.,* 351 U. S. 249, 259-60 (1957). *See Will v. United States,* 389 U. S. 90, 107 (1967)." *In Re Grand Jury Subpoenas,* 573 F. 2d 936, 940-41 (6th Cir. 1978). For several important reasons, we believe that the present case merits use of this exceptional writ. First, the establishment of a taxation scheme for a new, court-created, school district

24. (Cont'd)

percent each year thereafter; and (4) the State Board in adopting the $1.585 rate predicated the same upon an assumption which is invalid under State law.

Id. 17-18.

In its petition for mandamus in this court, the State observes: "While the district court does not use the term 'unconstitutional' in its opinion, its conclusions that S. B. 457 'must be rejected' (Opinion, p. 8)[,] 'may be invalidated' (Opinion, p. 15), and that a federal court has authority to 'strike down impediments . . . to an appropriate [desegregation] remedy' (Opinion, p. 12), compel this conclusion." Petition at 5 n. 1. However, in its latest opinion, the district court has clearly explained that "[t]he constitutionality of S. B. 457 was not reached," June 22 Slip Opinion at 16 n. 1, and that the court's "conclusion" in its May 5 opinion and order was that "the State Board failed to make the showing required to justify a permanent injunction of any tax rate in excess of the $1.585 figure." *Id.* at 14. In light of our disposition of the mandamus request, it is unnecessary for us to address these varying interpretations.

is an act of unique import, qualifying the matter for consideration under a device "reserved for really extraordinary causes." *Platt v. Minnesota Mining and Mfg. Co.,* 376 U. S. 240, 245 (1964). Second, because the subject matter of the mandamus action is inexorably intertwined with an important aspect of the opinions and orders presented for our review in the consolidated appeals, it would be an act of sheer sophistry to review the merits of the court's prior tax rate determinations without taking into consideration the subsequent act of the Delaware legislature and the additional court action of May 5 on the same subject. And finally, because the issue is neatly framed both by the briefs in the main appeals and in those supporting and opposing the mandamus request,[25] no additional purpose would be served by denying a review on the merits now; the demands of economical and effective administration of justice can be satisfied without prejudice to the rights of any interested party.

25. By order dated June 6, 1978, we permitted any party interested in the main proceedings to file an answer to the mandamus petition.

Appellees confined their response to the mandamus petition almost exclusively to an attack on the State's standing to seek the writ. Although the State was not a party to the proceedings below, it argues that it has standing "to vindicate, on behalf of Delaware and its citizens, core principles of federalism," and that "[o]nly the State, as an entity, can bring an action designed solely to protect the integrity of the constitutionally-protected taxing function of a State . . . ." Petition at 2, 8. While it may appear that the better course would have been for the State to move to intervene for purposes of appeal, we agree with a critical distinction raised in the State's petition: those named parties which may appeal the May 5 judgment pursuant to 28 U. S. C. § 1291(b) (including the State Board), are primarily concerned with the formulation of the actual tax rate that will go into effect; the State of Delaware, while obviously sharing this concern, directs its *mandamus* petition toward its unique interest in the approach taken by the district court in its handling of S. B. 457. Under these exceptional circumstances, in which principles of federalism are sought to be vindicated by a State nonparty whose declared interest differs from those of other parties in the main appeals, we believe the State properly has standing.

We are cognizant that the writ of mandamus is not to be used as a substitute for appeal. *Ex parte Fahey*, 332 U. S. 258, 259-60 (1947).

> On direct appeal, a court of appeals has broad authority to "modify, vacate, set aside or reverse" an order of a district court, and it may direct such further action on remand "as may be just under the circumstances." 28 U. S. C. § 2106. By contrast, under the All Writs Act, 28 U. S. C. § 1651(a), courts of appeals may issue a writ of mandamus only when "necessary or appropriate in aid of their respective jurisdictions."

Will v. Calvert Fire Insurance Co., — U. S. — (46 L. W. 4811, 4813, June 23, 1978) (Opinion of Justice Rehnquist). We are persuaded that, for the above stated reasons, to entertain the present petition is to aid our clear jurisdiction to determine the taxation issue presented on direct appeal. To entertain this petition is simply to consider additional matters not only relevant and germane to the issue on appeal, but absolutely critical to an intelligent disposition of it. As we consider the mandamus petition, however, we recognize the extremely narrow precedential effect of our action and reaffirm our fealty to the general rule that writs of mandamus are not substitutes for direct appeals, but rather are traditionally used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U. S. 90, 95 (1967), *quoting Roche v. Evaporated Milk Assoc.*, 319 U. S. 21, 26 (1943).

B.

In a matter fraught with much emotion, the question of taxation understandably has generated heated com-

munity interest. Where, as here, a tax rate has been imposed by a court as an important aspect of its desegregation decree, there occurs a tension between two venerable maxims of the American tradition: "Taxation without representation is tyranny" becomes the banner of some of those who are to be taxed, while the district court, safeguarding the effective implementation of its order, is deeply cognizant of the venerable phrase that "the power to tax involves the power to destroy." [26] The district court sought an accommodation between these noble concepts—balancing the right of the people to be taxed in accordance with a "politically" formulated rate against its own duty to ensure that the desegregation plan not be aborted by that taxation schema. Without reaching the merits of its decision, however, we have concluded that the May 5, 1978, determination must be reversed for a new hearing because of what we perceive to be a fundamental error in the conduct of the hearing for a permanent injunction.

True to the statement in its January 9, 1978, opinion that "the usual presumption of legislative regularity will not attach," 447 F. Supp. at 1026, the district court approached the injunction hearing without extending the requisite deference to which legislative judgments in the field of taxation are entitled. The district court did recognize the precepts announced in *San Antonio Independent School District v. Rodriquez*, 411 U. S. 1, 42 (1973):

> The very complexity of the problems of financing and managing a state-wide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. Jefferson v. Hackney, 406 U. S. [535, 546-47 (1972)].

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26. *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 427 (1819).

But weighing these precepts against what it called "[t]he inherent power of a court to take whatever steps are required to fashion an effective desegregation decree," May 5 Slip Opinion at 12, the court jettisoned "the usual presumption of deference to a legislature in taxation matters." *Id.* We are persuaded that in so doing, the court overstated its power to fashion, and insure implementation of, an effective decree. For while it is true that the court specifically recognized that "deference . . . does not mandate acceptance," *id.*, and while we agree that this particular formulation is a proper statement of the governing precept, we are convinced that the court failed to afford *any* deference to the legislative action. At best, the legislative solution was received as a neutral narrative fact; at worst, it was received with suspicion, subject to a condition that Delaware prove its regularity and constitutionality.

Properly, Delaware's statutory solution to the vexing taxation problem should have been received with the presumption of regularity and constitutionality mandated clearly and unequivocally by the teachings of the Supreme Court. Although the district court did not base its decision on the constitutionality of the state taxation scheme, *see* note 24 *supra*, the remedy in this case is the vehicle to cure constitutional violations. Therefore, it is not inappropriate to analogize Supreme Court teachings relating to the deference to legislative action where the issue of constitutionality is directly implicated. For example, in *Madden v. Kentucky*, 309 U. S. 83, 88, the Court stated:

> [I]n taxation, even more than other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and aggressive discrimination against particular persons and classes.

This language was repeated in *San Antonio Independent School District v. Rodriquez, supra*, 411 U. S. at 40-41, with the prefatory comment: "This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause". In *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 510 (1937), the Court explained how the presumption vindicates traditional notions of separation of powers:

> A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

And if other cases fail to explicate so clearly the rationale behind the presumption, it is only because the presumption is so impervious to alteration. *See, e.g., McGowan v. Maryland*, 366 U. S. 420, 425-26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 526 (1959) ("The States have a very wide discretion in the laying of their taxes.") *See also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U. S.

356 (1973). Moreover, it must be noted that *United States v. Missouri*, 515 F. 2d 1365 (8th Cir. 1975) (in banc), relied upon by the district court, did reverse the district court's imposition of a tax rate insofar as that rate exceeded one which was represented as adequate by state officials.

Under these percepts, in the proceedings to enjoin the operation of the rate set by the NCCPBC, the legislative solution should have been received by the district court with a presumption of regularity and constitutionality. Absent the proper presumption, the State Board's ability to make a strong showing on the merits—a requisite in any injunctive action—was improperly skewed. Accordingly, we will direct the district court to vacate its order of May 5, 1978, and to conduct a new hearing in accordance with the foregoing. Given the unusual posture of these proceedings, we further direct that the district court enter an order preliminarily enjoining a tax rate of $1.68 for current operating expenses and affirmatively imposing a tax rate of $1.585 until a final order on the request for a permanent injunction is entered. In this regard, we cannot emphasize strongly enough that nothing in our disposition of this issue is intended to interfere with the implementation of the desegregation plan in Northern New Castle County this September. To the extent that the State legislature may discover that the State Board's determination of priorities in setting the rate of $1.585, *see* Section VI C *infra*, must be altered, it may legislate a change retroactively.

C.

Although it is unnecessary for us to pass on the merits of the district court's May 5 taxation ruling, we nevertheless are compelled to highlight some points which may assist the court in its further proceedings and which, although self-evident, may have been relegated to an undeserved background position in the prior proceedings.

The district court was apparently—and understandably—concerned that, if set below a certain level, the State-authorized tax rate will prevent the effective implementation of the desegregation plan. Numerous times in its May 5 opinion, the court expressed concern that the State-approved budget did not reflect an *increment* to the normal operating budget sufficient to meet desegregation needs.[27] Our observation is that this overlooks the critical, and incontrovertible, proposition that any money budgeted by the State to the Northern New Castle County school system must be used by the NCCPBE, *first*, to effect the desegregation order, and then to meet the expenses of other programs. Put another way, it is the NCCPBE's responsibility to work with the money it has by attending first to all aspects of the remedial order, and then to other aspects of the school system's expenses. The Board has much discretion in setting the priorities within the latter group, but none as to the former.

For example, and only by way of illustration, the school authorities may decide to curtail certain extracurricular school programs which fall outside the area mandated by the court's desegregation order, so as to remain within budgetary limits. If any or all of these programs need be cut completely from the budget, this will occur as a result of the *legislature's* judgment, not the court's. The legislators who passed S. B. 457 were well aware of the remedial order which will go into effect this September.

27. *See, e.g.*, May 5 Slip Opinion at 20, 23:

> One can . . . say with some assurance that when less is spent on education during the first year of desegregation than would have been spent absent desegregation, the effort to desegregate is threatened if not imperiled.
>
> To embark on the long overdue course of desegregation with funds which, if minimally sufficient to satisfy operating costs for one year, are inadequate to meet the actual costs of desegregation and reorganization is to invite disaster.

We must assume not only their ability to compute what the mandatory expenses would be, but also their good faith in so doing.[28] Cognizant of what the State *must* pay by way of implementing the desegregation plan before using money for other purposes, the legislators arrived at an amount which may or may not imperil other *non*-Court-ordered aspects of the New Castle County school system. As the Supreme Court stated in *Carmichael v. Southern Coal and Coke Co., supra,* 301 U. S. at 510, "[the legislators] cannot record a complete catalogue of the considerations which moved [them] to enact [the law]." But given the nature of our political system, these legislators will most certainly receive feedback from the electors to whom they are accountable as to whether they have made the right choices.[29] Thus, without detracting from the importance of a federal court's duty to ensure that its remedial decrees be effected properly and wholly, we suggest that there are obvious inherent political safeguards involved in this case which should be permitted to run their own course.

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28. Indeed, in earlier hearings before the district court, the State Board of Education's attorney gave explicit recognition to the parameters of the State's good faith efforts. Contending that "the Legislature is ultimately the body which can . . . say . . . what tax rates are going to be," he conceded "that the Legislature [does not have] the right to frustrate a Federal Court decree," and that "it is never too late for the Democratic Legislature of this State to take constitutional action insofar as it doesn't unconstitutionally interfere with a proper order of this Court." Doc. 663Q at O-166, O-168, O-169-70.

29. Under S. 457, the NCCPBE "may annually set a tax rate for current operating expenses not greater than [the] maximum rate [set by] the State Board." Although we share the district court's observation that this does not seem to take into account such factors as inflation, *see* note 22 *supra,* again we are constrained to note that the populace's reaction to the increasingly pared-down budget which may result from this provision will be properly directed to the State Legislature.

It also bears emphasis that these observations are based on a factual complex in which the difference between the State rate and the court rate amounts only to $2.5 million in a package designed to produce school tax revenues of approximately $40 million. In the extreme case, obviously not present here, if the State had allocated only $8 million for court-ordered programs, and no funds, or substantially insufficient funds, to operate the remainder of the school system, such action by the State would clearly be unacceptable as interfering with the operations of the desegregation decree. *See Griffin v. County School Board,* 377 U. S. 218, 233-34 (1969). The balance, as always, should be struck, in the first instance, by the trial court.

VII.

That the district court retains supervisory jurisdiction until the transition to a unitary school system is completely effectuated, 447 F. Supp. at 1039, should not be construed as a change of emphasis that the primary responsibility for public education in Delaware rests with the State government and its subdivisions. Operating a nondiscriminatory school system is the responsibility of the State and not the federal court system. We detect nothing in the district court's opinion that ousts the State of Delaware from that primary responsibility. That the plan submitted by the State in 1977 pursuant to our mandate was properly rejected by the court should not deter the State Board of Education from working directly with the district court in efforts to eliminate "the vestige effects of pervasive *de jure* inter-district segregation." *Id.* at 1011.

The court-ordered plan which we have reviewed in this appeal was promulgated only because the State, through its legislature or its board of education, failed to come forward with a suitable plan. State authorities are

still invited, nay, urged, to come forward with meaningful solutions to this vexing problem, solutions that will achieve the same objectives as the court-ordered plan. Continued criticism, organized or otherwise, formal or informal, of the plan ordered by the federal courts as a last resort, is an insufficient and ill-advised response to the void caused by State inaction.

In the appeals at Nos. 77-2336 and 2337 and Nos. 78-1143, 1144, 1145, 1146, 1147 and 1148, the orders of the district court will be affirmed.

In the mandamus action at No. 78-1743, the writ will be granted in accordance with the discussion in Part VI, *supra*.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED AUGUST 5, 1977.

Brenda EVANS et al., Plaintiffs,

v.

Madeline BUCHANAN et al., Defendants.

Civ. A. Nos. 1816-1822.

August 5, 1977.

Joseph A. Rosenthal and Irving Morris of Morris & Rosenthal, and Louis L. Redding, Wilmington, Del., for individual plaintiffs.

Richard Allen Paul of Paul, Lukoff & Hurley, Wilmington, Del., of counsel, Louis R. Lucas, Ratner, Sugarmon, Lucas, Salky & Henderson, Memphis, Tenn., Paul R. Dimond of O'Brien, Moran & Dimond, Ann Arbor, Mich., for intervening plaintiffs.

Richard R. Wier, Jr., Atty. Gen., State of Del., and Regina M. Small, Asst. Atty. Gen., State of Del., William Prickett and Mason E. Turner of Prickett, Ward, Burt & Sanders, H. James Conaway of Young, Conaway, Stargatt & Taylor, Wilmington, Del., for defendant State Bd. of Ed.

Edward W. Cooch, Jr., of Cooch & Taylor, Wilmington, Del., for Marshallton-McKean School Dist.

Samuel R. Russell of Biggs & Battaglia, Wilmington, Del., for Alexis I. duPont School Dist.

William Poole of Potter, Anderson & Corroon, Wilmington, Del., for Alfred I. duPont School Dist.

James T. McKinstry of Richards, Layton & Finger, Wilmington, Del., for Claymont and Stanton School Dists.

John P. Sinclair of Potter, Anderson & Corroon, Wilmington, Del., for Newark School Dist.

Jerome O. Herlihy of Herlihy & Herlihy, Wilmington, Del., for Conrad Area School Dist.

Howard M. Handelman and Jeffrey M. Weiner of Bayard, Brill & Handelman, Wilmington, Del., for New Castle County Vocational-Technical School Dist.

James M. Tunnell, Jr., and Richard D. Allen of Morris, Nichols, Arsht & Tunnel, Wilmington, Del., for Mount Pleasant School Dist.

Aida Waserstein, Wilmington, Del., for intervening Hispanic plaintiffs.

David Anderson of Potter, Anderson & Corroon, Wilmington, Del., for New Castle-Gunning Bedford School Dist.

Thomas S. Lodge of Connolly, Bove & Lodge, Wilmington, Del., for DeLaWarr School Dist.

MURRAY M. SCHWARTZ, *District Judge*.

I. INTRODUCTION.

Presently before the Court are two motions filed by the Delaware State Board of Education ("State Board").[1] The first is a motion to stay all proceedings in this case pending a determination by the Supreme Court of the State Board's petition for a writ of certiorari.[2] The second motion urges that the Court adopt as a plan for desegregating the public schools of Northern New Castle the proposal contained in the State Board's report submitted to the Court on July 14 pursuant to a mandate of the Court of Appeals for the Third Circuit. On their face, these motions appear analytically and legally distinct. Closer examination, however, reveals that the issue of the acceptability of the State Board's plan is inextricably bound up with the issue of the propriety of a stay.

1. Doc. 538; Transcript of July 18, 1977 Argument (hereinafter July 18 Tr.) AM-11. All of the suburban school districts who are intervening defendants, except the DeLaWarr School District, have joined in the State Board's motion. July 18 Tr. AM-4-6, DeLaWarr opposes the stay motion. Transcript of Hearings Held July 19-25, 1977 (hereinafter "Hearings Tr.") 216.

2. The State Board's Petition for Writ of Certiorari was docketed on July 25, 1977 in the Supreme Court of the United States. At the time of the hearings (July 19-25), the suburban school districts had not yet filed their respective petitions for a writ of certiorari, but with the exception of DeLaWarr, several have made clear their intention to do so. Docs. 540, 543, 544. By its motion seeking adoption of the plan, the State Board is not altering or waiving its basic position that no unconstitutional segregation exists in the public schools in Northern New Castle County.

As discussed more fully *infra*,[3] one of the factors a court must weigh in considering a motion for a stay is whether the movants will suffer irreparable injury if the stay is not entered. The mandate of the Third Circuit which affirmed, with certain modifications not relevant here, the June 15, 1976 Order of the three-judge court ("June 15, 1976 Order"), designated September, 1977 for the initial implementation of a desegregation remedy. The injury defendants allegedly will suffer, absent a stay, derives basically from the residual effects of implementing a remedy that may be vacated and remanded or reversed. Therefore, it is essential that this Court attempt to determine if there is a meaningful quantum difference in such injury between the remedy proposed by the State Board and that developed by the three-judge court and affirmed as modified by the Third Circuit.[4] If there is a substantial difference in impact upon defendants, it must then be determined what remedy will take effect if a stay is not entered.

The proposal of the State Board now before the Court constitutes that Board's proposed remedy. If the Court

3. *See* p. A82 *infra*.

4. The June 15, 1976 Order called for the implementation of the one-district plan developed by the three-judge court unless the State Board and legislature enacted their own constitutional plan prior to September, 1977.

finds the proposal unacceptable, then the State Board, pursuant to the mandate of the Third Circuit, must appoint a five-member "New Board" and that New Board is charged with the responsibility of planning and implementing a desegregation remedy. Because questions have been raised regarding the precise responsibility assigned to the New Board, a brief digression is necessary.

Some confusion has arisen over whether the New Board is intended to devise an entirely new desegregation plan, including governance, or merely is to complete the planning and administrative work necessary to implement the one district plan outlined by the three-judge court in its May 19, 1976 opinion. *See Evans v. Buchanan*, 416 F. Supp. 328, 352-358 (D. Del. 1976). The text of Paragraph 4 of the mandate is virtually a verbatim restatement of Paragraph 3 of the Order of June 15, 1976. Subsequent to the entry of the three-judge court Order, a five member Board ("Interim Board") was appointed. The membership was expanded to thirteen members by the Delaware Legislature.[5] The Interim Board labored over the past 13 months to devise a desegregation plan and apparently understood their powers to include the development of an entirely new plan that did not use the one-district concept. Evidence of this approach is found in their report submitted to the State Board of Education (Doc. 528A). That report suggested the retention of the 11 existing school districts during a two year transition period, but also recommended that the school districts be supervised by a board composed of representatives from the 11 school districts. This governance structure is clearly inconsistent with the June 15, 1976 Order which required transfer of full authority to the Interim Board and abolition of the existing 11 school districts no later than September 1, 1977.[6] The

5. Senate Bill No. 796, as amended by Senate Amendment No. 1 (June 25, 1976).

6. Paragraphs 3(d); 7 of June 15, 1976 Order.

approach taken by the Interim Board may have been due in part to the fact that the State Board appears to have shared that interpretation of the June 15, 1976 Order.[7]

Because the Third Circuit was concerned only with the June 15, 1976 Order and the May 16, 1976 Opinion, conceivably and perhaps probably it was unaware of this history that was not made a part of the record in this case and thus did not realize that the adoption of the language of the June 15, 1976 Order carried with it a substantial historical gloss. In any event, notwithstanding what interpretation the Interim Board or the State Board placed on the June 15, 1976 Order, the Third Circuit mandate, when read in light of Part IV of the Third Circuit Opinion of May 18, 1977,[8] contemplates that the New Board will concern itself with the development of a desegregation plan only in the context of the one district governance concept described by the three-judge court.

Thus, the Court is faced with two possibilities. If the State's proposal is accepted, it will be implemented in September, 1977, and will have certain effects on the current structure and operation of the affected Northern New Castle County school districts. If the State's plan is not accepted, the New Board will be appointed and, in the absence of a stay, the one district plan will be implemented in the fall of 1977, with the concomitant demise of the eleven affected districts.

The question of what injury the movants will suffer in the absence of a stay pending determination of their application for certiorari involves primarily an examination of the effects of the plan that is implemented. The one-district plan would require at a minimum the abolition of the ten suburban and Wilmington school districts as dis-

7. Doc. 528 Appendix B at 1.

8. *Evans v. Buchanan*, 555 F. 2d 573, 380-81 (3d Cir. 1977); for the relevant text of Part IV, *see infra* at A77-A78 n. 29.

tinct entities, a substantial reorganization of the administrative internal structure, certain major decisions involving adjustments to the tax rates and teacher salaries in the now separate districts, as well as a wholesale reorganization of pupil and teacher assignments. The State Board's proposal does not contemplate the vast administrative reorganization involved in the one-district plan, but potentially could lead to major changes in pupil and teacher assignments.

Substantial disruption of the educational process in the affected school districts would occur if either plan is implemented and the Third Circuit subsequently is reversed. However, clearly the disruption caused by the disengagement of the one-district plan would be more substantial and severe than if disengagement of the State Board's proposal were required.[9] Because of this difference, it is impossible for the Court to evaluate accurately the factor of irreparable injury without first determining which plan is to go into effect absent a stay. Accordingly, after a brief recitation of the current factual and procedural background pertinent to a determination of the present motions, consideration will be given to the acceptability of the State Board's proposal prior to examining the merits of the Motion for a Stay.

II. Current Factual and Procedural Background.

Prior opinions detail the history of this 20 year litigation,[10] including the proceedings since 1971 on plaintiffs' amended complaint. For present purposes, it is only necessary to review what has transpired subsequent to the

9. July 18 Tr. AM-78-79.

10. This law suit began in 1957 with the current phase activated in 1971. *See, e.g., Evans v. Buchanan*, 424 F. Supp. 875, 876-78 (D. Del. 1976); *Evans v. Buchanan*, 416 F. Supp. 328, 334-35 (D. Del. 1976); *Evans v. Buchanan*, 393 F. Supp. 428, 430-31 (D. Del. 1975); *Evans v. Buchanan*, 379 F. Supp. 1218, 1220-21 (D. Del. 1974).

May 19, 1976 three-judge court remedy decision which was preceded by a Supreme Court summary affirmance of the three-judge court Order emanating from its two opinions in which it found the constitutional rights of plaintiffs had been violated. Following the three-judge court remedy decision, the State Board of Education and intervening defendant school districts filed a direct appeal to the United States Supreme Court, as well as a protective appeal to the Third Circuit Court of Appeals. Defendants' protective measure proved necessary as the Supreme Court dismissed the direct appeal for want of jurisdiction. *Delaware State Board of Education v. Evans*, 429 U. S. 973, 97 S. Ct. 475, 50 L. Ed. 2d 579 (1976). Thereafter, the Third Circuit sitting en banc [11] affirmed the decision of the three-judge court with certain modifications in an Opinion dated May 18, 1977. *Evans v. Buchanan, supra*, 555 F. 2d 373. Because of the modifications contained in the majority opinion, the Third Circuit set forth the specific order to be entered by this Court, and remanded for entry of that order.[12]

On May 19, 1977, this Court entered the order delineated in the Third Circuit majority opinion. The Third Circuit's order replicated much of the order originally entered by the three-judge court, and from which the appeal had been taken. The Third Circuit mandate also directed that the State Board of Education (or other appropriate authority) was to file a "formal report in accordance with Part IV [Governance] of the Opinion of the Court of

11. Chief Judge Seitz and Judge Gibbons did not participate in the en banc consideration of the appeal.

12. The Third Circuit further directed that its mandate was to issue "forthwith," as opposed to the normal time for issuance contained in F. R. App. P. 41(a), which provides: "The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order."

Appeals of the Third Circuit within 60 days from May 18, 1977." *Evans v. Buchanan, supra,* 555 F. 2d at 381.

On July 14, 1977, defendant State Board of Education filed a formal report as required by the order. The report disclosed that the only concrete measure which had been taken since entry of the three-judge court remedy order was passage of legislation authorizing majority to minority voluntary transfers. This would permit transfers of black students from the Wilmington and DeLaWarr [13] School Districts to the remaining intervening suburban school districts, and transfers of white students from the suburban school districts to either the Wilmington or DeLaWarr School District.[14] The report also contained a "plan" pro-

13. Throughout these proceedings the DeLaWarr School District, which has an approximate black enrollment of 55% (Department of Public Instruction ("DPI") Ex. 52, p. 11), has pursued a different role than its suburban counterparts. DeLaWarr intervened as a defendant, along with the other suburban districts of New Castle County, following the Supreme Court's decision in *Milliken v. Bradley,* 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974). However, unlike the other intervening school districts which opposed adoption of an interdistrict remedy, DeLaWarr has aligned itself primarily with plaintiffs in seeking an interdistrict remedy. For this reason, unless otherwise noted, references hereinafter to "the suburban school districts" will not include DeLaWarr, and also will not include Appoquinimink School District, which was excluded from the desegregation area by the three-judge court.

14. Legislation passed as the sole response to the three-judge court Ord r of June 15, 1976 for the 1976-77 school year permitted a student in the delineated desegregation area to transfer from his district to any other district that would accept him. 14 Del. C. 603(c). All but two suburban school districts accepted black students as transferees, but not white students. The Wilmington District refused to forward records of white students. (DPI Ex. 52, p. 4)

Prior to the Third Circuit opinion, the legislation was recast only for the 1977-78 school year to require school districts "to accept all applications for transfers by applicants who are members of the race which is in the majority for the 1976-77 school year in the public school district in which they reside and which is in the minority for the 1976-77 school year in the school district to which

posed by the State Board of Education which purportedly complied with the requirements established in the majority opinion of the Third Circuit. However, the State legislature neither has expressly adopted the plan through legislation nor has it conferred upon the State Board the discretionary authority it would need to implement the plan. Thus, the State Board, which lacks statutory authority to make pupil assignments across district lines, could not implement its proposed plan, even if it so desired.[15] The proposed plan only can be implemented by Order of this Court, pursuant to the exercise of its equitable powers.

At the request of the Court and so that the State Board's proposed plan could be considered in an appropriate procedural context, the State Board filed a motion seeking adoption of its plan by the Court. The motion was filed under objection by the State Board, and with reservation of its opposition to adoption of any interdistrict remedy.

Argument on the State Board's application for stay was held on July 18, 1977 and hearings were held on the State Board's plan from July 19-25, 1977. Plaintiffs vig-

14. (Cont'd.)
they apply as transfers. . . ." 129th Gen. Assembly Sen. Bill No. 173. For the 1977-78 school year, somewhere between 746 (PX-3A) and 1,194 (DPI 50) or between approximately 6.6 and 10.5% of the black students from Wilmington have elected to transfer to a suburban district. In addition, 302 black students from DeLaWarr black student population elected to transfer to other suburban districts. In contrast to voluntary transfer of blacks, only 3 white students elected to transfer into Wilmington and none into DeLaWarr. DPI Ex. 50.

15. It is noted, however, that between 1968 and 1973, the State Board, by regulation, subsidized interdistrict transportation of students, while legislation passed by the General Assembly limited such subsidization to intradistrict transportation. 94% of the students receiving transportation subsidies were white. For a fuller discussion, *see Evans v. Buchanan, supra,* 393 F. Supp. at 436-37.

orously opposed acceptance of the State Board's plan and granting of the stay. They also sought to introduce their own plan, labeled Plan Q. The Court did not accept the plan into evidence, although it permitted plaintiffs to make an offer of proof on the record concerning Plan Q.[16] None of the suburban school districts made offers of proof concerning alternate plans, although they were accorded the opportunity to do so.

At the hearings, counsel for the suburban school districts indicated that they viewed the voluntary transfer legislation to be sufficient to vindicate the constitutional rights of plaintiffs which had been infringed. If the Court did not agree with that proposition, the suburban school districts indicated that the State Board's plan was acceptable as a second choice. Counsel for the suburban districts also either orally joined in the application of the State Board for a stay, or as in the case of the Newark, Marshallton-McKean, Claymont and Stanton School Districts, filed their own stay applications.[17] (Doc. Nos. 540, 543, 544)

In summary, in the fourteen months between issuance of the three-judge court remedy opinion and commencement of the July, 1977 hearings, the only steps taken by the State to devise and implement school desegregation was passage of the voluntary transfer legislation as previously rehearsed and proposal of a plan by the State

16. This Court ruled that it would not commence another round of hearings on plans. The offer of proof was permitted to enable plaintiffs and suburban districts to make the necessary record to preserve this point on appeal.

17. The DeLaWarr School District opposed both the State Board's plan and the various applications for stays. No position on either motion was taken by the Appoquinimink School District, which was not represented at the hearings, nor by the New Castle County Vocational-Technical School District, which was represented at the hearings, but was exempt from the provisions of the Order of June 15, 1976.

Board which it had no power to implement. Attention is now turned to the State Board's proposal.

III. State Board's Proposal.

The proposal submitted by the State Board of Education would require that all black students in Wilmington in grades 7 through 12 be assigned to suburban school districts for the school year 1977-78.[18] Each student, however, would retain the right to elect to remain in his or her Wilmington school.[19] Three general questions frame this Court's inquiry into the acceptability of the plan: (1) Whether the Third Circuit's mandate contemplated the presentation of a proposal for desegregation which requires a federal court order to be implemented; (2) Whether the proposal purports to achieve that degree of fairness essential to the framing of any equitable decree, which is to remedy a constitutional violation; (3) Whether the proposal's provisions promise realistically to desegregate the public schools of Northern New Castle County *now*. *See Green v. County School Board of Kent County*, 391 U. S. 430, 439, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

In its report to the Court,[20] the State Board takes the position that it is not "feasible" to determine what the affected school districts and school populations would be

18. The unmistakable implication of counsel's varied statements and the testimony given during the July, 1977 hearings was that removal by the Third Circuit majority of the three-judge court guidelines as the starting point of what would constitute a prima facie desegregated school permitted consideration of "one way" busing as an acceptable court imposed equitable remedy.

19. The testimony adduced at the hearings clearly indicated that the State Board does not intend for its proposal to supplant the majority to minority voluntary transfer legislation, but rather anticipates that the two plans would be coordinated. *See also* Doc. 548 at 83.

20. Report of the State Board of Education Required by the Opinion and Order of the Circuit Court of Appeals in this Case. (Doc. 548)

today "but for" the constitutional violations found by the three-judge court and affirmed on appeal.[21] It is the State Board's position, however, that its proposal represents a "practical and realistic response" to the Circuit Court mandate.[22]

The State Board's proposal recommends the assignment of black students residing in Wilmington and enrolled in grades 7 through 12 to suburban school districts for the 1977-78 school year. As part of this process, attendance zones are to be drawn in the City of Wilmington corresponding to the various suburban districts.[23] In effect, for purposes of pupil assignment, each attendance zone would be part of the suburban district to which the Wilmington students residing therein would be assigned.[24] For the 1978-79 school year, grades 1 through 6 are to be incorporated into the plan and the attendance zones are to be redrawn, if necessary, to balance roughly the percentage of black students in each school district.

As noted earlier, the proposal permits any students to elect to remain at his or her present school. Testimony given at the hearings indicated that for the 1977-78 school year, a student would have between ten and twenty days prior to the opening of school to decide whether to transfer back to his or her Wilmington school.[25] Thus, the choice would have to be made without benefit of having attended the suburban school, perhaps without even having visited it, and, if assigned to a suburban district with several schools serving the same grade level, without knowing the exact school within the district to which assignment would

21. Doc. 548 at 36-37.

22. *Id.* at 37.

23. *Id.* at 82.

24. Hearings Tr. at 319.

25. DPI Ex. 55; Hearings Tr. 237-238.

be made. For those who elect to accept their suburban assignments, they may revoke their choice by submitting a form prior to April 30, 1978. These students would then return to their Wilmington schools for the 1978-79 school year.[26]

The State Board's proposal contains additional provisions covering the varied responsibilities of the various school districts including tuition payments, the establishment of local grievance procedures for parents, and transportation. The proposal also sets out a procedure whereby Wilmington teachers displaced by the exodus of students to the suburbs can seek employment with suburban districts. Basically the proposal requires each suburban district to hire one Wilmington teacher for each state unit of pupils transferred from Wilmington to its district, assuming a sufficient number of qualified Wilmington teachers apply.[27] The exact procedure to be used in implementing this policy is somewhat unclear. Ultimately, however, the affected teachers would be faced with deciding whether to remain at their higher paying positions in Wilmington in the hope they will not be terminated in the spring of 1978 or to seek lower paying positions with a suburban district.[28]

The absence of implementing legislation creates the need for an order by this Court before the State Board's proposal can be put into operation. That fact raises an issue of serious concern. Paragraph 2 of the mandate of the Third Circuit orders the schools in Northern New Castle County to be "desegregated in accordance with the Opinion of the Court of Appeals for the Third Circuit" and

26. The State Board's report is ambiguous and the testimony of witnesses uncertain as to whether a student, having elected to stay in Wilmington, can retract the election in a subsequent year and return to his assigned suburban school. Hearings Tr. 261-64.

27. Doc. 548 at 85.

28. *Id.* at 85-86.

to be "reorganized into a new or such other new districts as shall be prescribed by the state legislature *or* the State Board of Education. . . ." (emphasis added) Paragraph 4 of that mandate provides: "The State Board of Education shall, if the state legislature or the State Board of Education do not promptly comply with paragraph 2 of this Order [appoint the New Board] . . . to oversee the operation of the schools of the area as defined in ¶ 2 of this Order. . . ." It must be determined whether the mandate permits consideration of a State Board proposal that requires a federal court order for implementation or, alternatively, only gave the State of Delaware the opportunity to formulate its own desegregation plan which was to be self-executing and thus without need for further judicial action.

The State Board argues that the use of the word "or" in paragraphs 2 and 4 of the mandate is critical. Its position is that the Third Circuit was well aware that the State Board has no power to reorganize school districts or to reassign students; that power resides exclusively with the legislature. By its use of the word "or," the State Board contends the Third Circuit clearly intended to permit two possible courses of action: (1) the legislature could act to reorganize the school districts and pupil assignment patterns; (2) the State Board could submit to this Court a plan to desegregate the relevant school districts which, if satisfactory, would then be implemented by court order.

At first blush, the defendant's argument has certain appeal, especially since the crucial phrase was added by the Third Circuit to the basic language of the three-judge court order of June 15, 1976. But when viewed from the broader context of the current posture of this litigation and its prior development, it is concluded that the mandate does not permit adoption of a State Board plan in the absence of implementing legislation.

Prior to the issuance of its May 19, 1976 Opinion, the three-judge court solicited and received nineteen proposed plans to remedy the violations found by that Court. The proposals included both interdistrict and Wilmington-only plans. After having been submitted to the Department of Public Instruction for professional comment and evaluation, the three-judge court held three weeks of hearings, during which many of the proposals underwent modification. *Evans v. Buchanan, supra,* 416 F. Supp. at 334-35. After this extensive exposure to a wide variety of plans, the three-judge court declined to adopt any of the proposed plans ordered the implementation of a plan based on the concept of one district. However, the Court stressed that its remedy would not take effect if the State Legislature and State Board were to act to implement their own constitutional desegregation plan. *Evans v. Buchanan, supra,* 416 F. Supp. at 357. Clearly, the three-judge court was not inviting the submission of a new desegregation plan that would require entry of a court order before implementation could take effect. Rather, the Court was indicating its continued willingness to defer to the legislative process in developing a remedy so long as the remedy passed constitutional muster.

Similarly, the Third Circuit mandate did not anticipate the submission of a new proposal that would form the basis of a judicially ordered remedy. In Part IV of its Opinion, the majority expressly affirmed and approved the three-judge court's decision to permit the State Legislature and State Board to act so as to pre-empt the need for a judicial remedy. When viewed in the light of all that has preceded the current posture of this case and Part IV of the Third Circuit majority opinion,[29] the conclusion seems

29. "In ordering reorganization or consolidation of the New Castle County school districts, the district court stressed that 'the State Legislature and the State Board of Education may take such

inescapable that this Court has been directed to proceed to the prompt appointment of the New Board and to the implementation of the one district remedy unless timely action by the State rendered such action unnecessary. The time for that action has expired.

Accordingly, the Court concludes that it may not consider the merits of the State Board's proposal. The mandate of the Third Circuit contemplates only two possibilities: (1) action by the State enacting its own plan for desegregation; or (2) appointment of the New Board and implementation of the one-district plan. As the State has not acted, this Court must.

Even if this Court were permitted to consider the State Board's proposal, the result in this case would be no different. I find the proposal unacceptable as an equitable remedy for the constitutional violations found by the three-judge court. The most obvious and significant flaw is that the proposal places the entire burden of the remedy on those whose rights have been violated. In formulating a remedy for constitutional violations, this Court must exercise its equitable powers. One would find it difficult to create a more graphic paradigm of an inequitable remedy than one which assigns to those who have been wronged the responsibility of correcting those wrongs. The uncontroverted testimony from State Board of Educa-

29. (Cont'd.)
steps as are not violative of constitutional rights to change the pattern set here,' 416 F. Supp. at 357, and ordered creation of an interim board to operate the schools 'for so long as the State takes no action.' *Id. We specifically affirm this governance plan and emphasize that prompt compliance by the state may make action by the interim board unnecessary.* Moreover, we do not mandate any specific number of districts which the state may create within the area presently encompassed by the defendant districts nor do we require that all the existing districts be reconstituted. We do caution that a 'Wilmington only' plan will not be adequate." 555 F. 2d 373, 380-1 (3d Cir. 1977). (emphasis added)

tion personnel adduced at the hearings established that: no white student, suburban or city, would be assigned to a different school district, but every black student in Wilmington would be reassigned.[30]

Additionally, if every black student accepted his or her assignment, the resulting effect on the Wilmington School District would be the creation of a virtually all white public school system with the exception of certain specialized schools and kindergartens which would remain substantially all black.[31] Conversely, if all black students chose to transfer back to their familiar Wilmington district rather than face the "unknown" in a suburban district, there would be no extensive dismantling of the dual school system found by the three-judge court to exist in Northern New Castle County. Thus, the closer the actual experience approaches either extreme, the further away is the accomplishment of desegregation.

This Court also is charged with the responsibility of supervising a desegregation plan that "promises realistically to work *now*." *Green v. County School Board, supra,* 391 U. S. at 439, 88 S. Ct. 1689. *See also Louisiana v. United States,* 380 U. S. 145, 154, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965). A basic problem with the State Board's proposal is that no one knows what the plan promises to accomplish. Indeed witnesses from the State Department of

30. It is noted in passing that no suburban teacher would have his or her job jeopardized, but Wilmington teachers would have to make very difficult decisions concerning their jobs and, for some, pension rights would be affected. A teacher's pension is calculated based on the last five years' salary. Since Wilmington teachers are paid a higher salary than their suburban counterparts, acceptance of a job in suburban school at a lower salary could affect the pension rights of an individual teacher. While the unfairness to the Wilmington District teacher is mentioned, it must be remembered it is the constitutional right of students, not Wilmington District teachers, that must be remedied.

31. Hearings Tr. 69-75.

Public Instruction expressly declined to predict the results of implementing the plan and disclaimed that any conclusions could be inferred from the history of the voluntary transfer program.[32]

At bottom, the State Board's proposal, dubbed "reverse volunteerism" by its proponents, is based on the concept of "freedom of choice," even though the initial assignment is involuntary. Such a proposal viewed in the context of its proponents being unable to represent it will work and the more than twenty year delay in the dismantling of an interdistrict dual school system simply is unacceptable as an equitable remedy and inconsistent with the mandate of the Supreme Court in *Green*. *Green v. County School Board, supra,* 391 U. S. at 439, 88 S. Ct. 1689.

Having concluded that the State Board's proposal is unacceptable for procedural, equitable and substantive reasons, it follows that unless a stay motion is granted, the school districts of Northern New Castle County will be desegregated in the fall of 1977 with governance in a single district in accordance with the Opinion of the Court of Appeals for the Third Circuit. Accordingly, attention is now turned to the motion for stay.

IV. Motion For Stay.

A motion for a stay is addressed to the sound discretion of the Court. *Coppedge v. Franklin County Board of Education,* 293 F. Supp. 356, 362 (E. D. N. C. 1968). The burden of the State Board and the suburban school districts in the case at bar is to make: (1) a showing that they will suffer irreparable injury if the stay is denied; (2) a strong showing they likely will succeed on the merits of their appeal; (3) a showing the plaintiff's will not be substantially harmed by the stay; and (4) a showing no harm will be done to the public interest. *Reserve Mining Co. v. United States,* 498 F. 2d 1073, 1076-1077 (8th Cir.), *application to vacate stay denied,* 419 U. S. 802, 95 S. Ct. 287, 42 L. Ed. 2d 33 (1974).

32. *See, e.g.,* Hearings Tr. 172-73.

Although the above criteria must be applied individually to the facts of this case, the ultimate decision by the Court must be made in light of all the criteria, unless the movant's claim is so palpably devoid of any showing of irreparable injury or probability of a successful appeal that further consideration of other factors would be futile. *See Evans v. Buchanan, supra,* 424 F. Supp. 875. As a court of equity exercising its discretionary authority, it is essential that in the final analysis all four factors be considered together and the relative showings be measured. Further, the express language of the criteria reflects that a court should not and perhaps cannot erect an artificial absolute standard; there are degrees of irreparable injury and probability of a successful appeal. The duty of this Court is to weigh the strength of these showings against each other and balance them against the potential harm to the interests of the plaintiffs and the public.[33] *Cf. Alaska Interstate Co. v. McMillian,* 402 F. Supp. 532 (D. Del. 1975).

33. Several of the school districts have suggested that Paragraph 11 of the mandate of the Third Circuit provides for a stay of this case pending disposition of the writ of certiorari. Paragraph 11 is almost a verbatim restatement of Paragraph 10 of the Order of June 15, 1976. The Third Circuit language adds only "VI C," thereby specifying the portion of the May 19, 1976 Opinion where the three-judge court provided for a stay of the implementation of its plan. The interpretation suggested by defendants was considered by the Court in connection with an earlier application for stay (Doc. 506). Although at that time the issue involved exclusively the Order of June 15, 1976, the disposition made there is equally applicable to the instant argument. Transcript of Argument held on May 5, 1977, pp. 10-14, 82.

A. *Irreparable Injury*

As noted earlier, the issue of irreparable injury in the context of this stay motion involves measuring the effect upon defendants of implementing a remedy during the pendency of the State Board's petition for writ of certiorari to the Supreme Court. The preceding section of this Opinion discussed the inadequacies of the State Board's proposal and the corollary conclusion that the one district plan, as modified on appeal, must be implemented. Thus, the issue is what irreparable injury, in the absence of a stay, implementation of the plan will cause the defendants.

The most cataclysmic change that will occur if a stay is not granted is the abolition of the eleven affected school districts as distinct political and administrative entities. The consequences of this major reorganization are similarly very serious. Affidavits submitted to the Court by various school administrators recited a litany of major decisions that would have to be made in order to convert from eleven districts to one.[34]

At this late date, the various school districts through the governmental offices of New Castle County have completed sending statements of taxpayers which will lead to collection of tax revenues for the 1977-78 school year. Those taxes are collected on the basis of different rates determined by district operating expenses and debt service requirements.[35] The New Board would be faced with the responsibility of distributing the funds on some equitable basis throughout the entire district. Moreover, if by reason of the reorganization supplemental tax revenues were needed, the New Board would have to develop a new uniform tax rate to be assessed in the district that takes into account the different operating expenses and indebtedness

34. Docs. 510, 512, 513.

35. Affidavit of Howard E. Row (Doc. 512) at 4-5.

of the existing school districts. The Board also would have to resolve the problems caused by teachers with similar qualifications in different districts who are paid at different salaries and represented by different bargaining representatives.

As the central governing board for the new district, the New Board also would have to develop and implement a new administrative structure for the public schools in the eleven existing districts. Undoubtedly, this would require substantial changes in the present hierarchy and decision-making procedures. If the Supreme Court were to vacate or reverse the judgment of the Third Circuit, school administrators very likely would have to unscramble all that had occurred pursuant to the Third Circuit mandate.

Finally, the New Board must develop a pupil assignment plan that desegregates the public schools of Northern New Castle County. Approximately 60,000 school children are affected by this litigation. Lasting harm would be done to the education of these children if they must endure the turmoil and uncertainty involved in reorganizing into one district and then must undergo the rigors of disestablishing the district if the defendants' petition to the Supreme Court were successful. There very likely also would be substantial disruption of teaching assignments,[36] and potential curriculum hiatus for students because not all districts have identical course offerings.

Although each individual item described above may not constitute irreparable injury, when viewed as a whole, it is concluded that the defendants have shown that implementation of the one-district plan will cause irreparable injury if their petition is subsequently successful. Proof of irreparable injury is insufficient, however, to sustain a motion for a stay, if the appeal is unlikely to be successful as

36. *Id.* at 3.

that language is hereafter defined [37] or, when taken together, it cannot be said to outweigh the harm to the plaintiffs and to the public interest caused by entry of the stay.

B. *Strong Showing on the Merits*

According to the test accepted by virtually all courts, including this one,[38] one seeking a stay pending appeal on disposition of writ of certiorari must make "a strong showing that he is likely to succeed on the merits of the appeal." *Reserve Mining Co. v. United States, supra,* 498 F. 2d at 1076. Although this standard is similar to one of the tests for issuance of a preliminary injunction,[39] the posture of a case is significantly different when preliminary injunctive relief is sought from when a stay is requested. In the former, the Court has not ruled on the merits of the case and need only make an initial determination of the reasonable probability of the applicant's eventual success. *See A. O. Smith v. FTC,* 396 F. Supp. 1108, 1119 (D. Del. 1975). In the latter, the Court has issued its determination, after a full consideration of the merits. The above-quoted standard would seem to require that a district court confess to having erred in its ruling before issuing a stay.

Common sense dictates that a literal reading of the standard would lead most probably to consistent denials of stay motions, despite the immediate threat of substantial irreparable injury to the movant. The almost inescapable conclusion is that the standard cannot mean what its language would indicate.[40]

37. *Infra* p. A83 *et seq.*

38. *See Evans v. Buchanan,* 424 F. Supp. 875, 879 (D. Del. 1976).

39. *See A. O. Smith v. FTC,* 530 F. 2d 515, 525 (3d Cir. 1976).

40. An examination of the source of the present standard further buttresses this conclusion. The test originally was formulated in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*

A more reasonable interpretation can be developed by analyzing the policy underlying its inclusion as a criterion for issuance of a stay. In a case where the movant will suffer irreparable injury in the absence of a stay, consideration of the merits of the movant's appeal permits an evaluation of whether that injury is likely to occur in any event. It seems illogical, however, to require that the court in effect conclude that its original decision in the matter was wrong before a stay can be issued. Rather, a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially. This is not to say, however, that every time a case presents difficult questions of law a stay should be entered. As noted earlier, the four factors must be viewed together and the interest of the movant balanced against

40. (Cont'd.)
(FPC), 104 U. S. App. D. C. 106, 259 F. 2d 921, 925 (1958). *See* Wright & Miller, Federal Practice and Procedure: Civil § 2904. Significantly, *Virginia Petroleum Jobbers* did not involve a stay of a district court proceeding. The Association in that case sought in the Circuit Court of Appeals both an injunction pending appeal and to stay an administrative proceeding by the Federal Power Commission. The Court of Appeals understandably required a strong showing of the Association's likelihood of success of its appeal before it would disrupt the normal operation of the administrative process. *Virginia Petroleum Jobbers Ass'n v. FPC, supra,* 259 F. 2d at 925. Moreover, the stay was sought pending complete review of certain other, related FPC proceedings by the Court of Appeals. Thus, the application for a stay was not only almost identical to an application for a preliminary injunction but was considered simultaneously with a request for an injunction. The Court of Appeals logically applied tests very similar to those applicable to a preliminary injunction. But a motion for a stay filed after hearing, decision, judgment, appeals, and issuance of mandates is vastly different. It is therefore concluded a motion to stay in this procedural context cannot be approached in the same manner that a court treats a motion for preliminary injunction.

the interests of the other parties and the public. It is the duty of the court to exercise its discretion so that an equitable resolution is achieved. In the instant case, the court must now examine the questions raised by the certiorari petition to the Supreme Court and the clarity of the law in the area of school desegregation to determine whether the defendants have met their burden.

The defendants cite numerous discrete issues as the basis for their certiorari petition. These various issues, however, can be distilled to one fundamental dispute between the parties: each side has characterized this current phase of the *Evans v. Buchanan* litigation radically differently.

The plaintiffs contend that this is and has been a "remedy" case, not a "violation" case. That is, what prompted the filing of an amended complaint in 1971 was the failure of the defendants to dismantle the interdistrict *de jure* segregation which had been found to exist in Delaware at the time of *Brown v. Board of Education* (*Brown I*).[41]

The long process of desegregating the public schools of Delaware began in the State court system over 25 years ago.[42] The State court decisions were affirmed in one of the companion cases to *Brown I*. Two years later litigation was instituted in this Court to seek compliance with the mandate of *Brown I* and *Brown II*.[43] Plaintiffs submit that compliance simply has never been accomplished.

Plaintiffs emphasize the finding of the three-judge court that the *de jure* system in effect in 1954 was a "cooperative venture involving both city and suburbs." *Evans*

41. 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

42. *Belton v. Gebhart*, 32 Del. Ch. 343, 87 A. 2d 862 (1952); *Gebhart v. Belton*, 33 Del. Ch. 144, 91 A. 2d 137 (1952).

43. *Brown v. Board of Education*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

v. Buchanan, supra, 393 F. Supp. at 437. Further, that interdistrict *de jure* system was never completely eradicated. *Id.* at 437-38; *Evans v. Buchanan, supra*, 416 F. Supp. at 341 n. 43. Under this theory, the issue before the three-judge court was not whether a new *de jure* segregated educational system had been established, rather it was whether the State of Delaware had discharged its affirmative duty to desegregate the schools of northern New Castle County. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). Plaintiffs further assert that various additional violations found by the three-judge court constitute separate, independent constitutional violations and were also in furtherance of perpetuating the dual school system which has not been dismantled.

By contrast, the defendants urge that the only segregation which the district court found had not been remedied since *Brown I* was in the Wilmington School District. *See Evans v. Buchanan, supra*, 379 F. Supp. at 1223. The defendants point out that the district court expressly noted that no evidence had been introduced to show that the suburban districts were not operating unitary school systems and that there was an express finding that the Wilmington and suburban districts have largely acted independent of each other. *Evans v. Buchanan, supra*, 393 F. Supp. at 437, n. 19. Therefore, the defendants argue that an interdistrict remedy is inappropriate in this case absent a finding that the defendants have erected a new dual school system which has interdistrict effects. Moreover, the defendants contend that the findings of constitutional violations articulated in the three-judge court's March 27, 1975 Opinion [44] provide an inadequate basis for entering an interdistrict remedy because those findings as to discrimi-

44. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975).

natory intent and incremental segregative effect do not comply with the requirements set out by the Supreme Court in recent race discrimination cases. *See, e.g., School District of Omaha v. U. S.*, — U. S. —, 97 S. Ct. 2905, 53 L. Ed. 2d 1039 (1977); *Brennan v. Armstrong*, — U. S. —, 97 S. Ct. 2907, 53 L. Ed. 2d 1044 (1977); *Dayton School Board of Education v. Brinkman*, — U. S. —, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U. S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). Defendant State Board does concede, however, that if plaintiffs' characterization is correct, the findings of the three-judge court with respect to discriminatory intent and incremental segregative effect are adequate. (Hearings Tr. 920).

These competing characterizations do raise vexing legal questions. This Court has no difficulty in concluding that the three-judge court was correct in its rulings. Rather, what is troublesome is that the summary affirmance by the Supreme Court in this case preceded the decisions in all of the cases heavily relied upon by the defendants. Thus, the concern is whether and to what extent the principles expressed in those subsequent decisions have any application to a case such as this where the trier of fact found that the vestiges of an interdistrict *de jure* segregated school system had not been completely dismantled.[45] *Cf. Corpus Christi School District v. Cisneros*, 404 U. S.

45. In my opinion, those cases do not apply to the instant case. I recognize, however, that in the procedural posture of this case, it is not my opinion that counts, but rather that of the Supreme Court. Further, if those cases were applicable, the three-judge court made all the subsidiary findings with respect to discriminatory intent and incremental segregative effect (unless that phrase is to mean precise mathematical percentage) that the record permits without resort to sheer speculation.

1211, 92 S. Ct. 9, 30 L. Ed. 2d 15 (1971) (Black, Circuit Justice).

Moreover, there are complicating factors which this Court must consider in evaluating whether the defendants have made a showing sufficient to warrant entry of a stay. The three-judge court in this case issued two opinions on the question of whether the State Board and other intervening defendants were guilty of constitutional violations. *Evans v. Buchanan, supra*, 379 F. Supp. 1218; *Evans v. Buchanan, supra*, 393 F. Supp. 428. The Order entered pursuant to those opinions was summarily affirmed by the Supreme Court. *Evans v. Buchanan, supra*, 423 U. S. 963, 96 S. Ct. 381, 46 L. Ed. 2d 293 (Rehnquist, J., joined by Burger, C. J. and Powell, J., dissenting). Subsequently, the three-judge court issued an Opinion on the remedy to be imposed to redress the violations. *Evans v. Buchanan, supra*, 416 F. Supp. 328. This ruling was affirmed with modifications by the Third Circuit in a 4 to 3 decision. *Evans v. Buchanan, supra*, 555 F. 2d 373. Against this background must be juxtaposed the continued active interest displayed by the Supreme Court in school desegregation cases.[46] Indeed, the Third Circuit rendered its de-

46. A review of such cases considered by the Supreme Court for the 1976-77 term reveals that the Court has subjected to close scrutiny decisions finding extensive constitutional violations or decisions in which comprehensive remedies for such violations have been ordered. Certiorari was granted in 6 of 13 cases involving school desegregation-related issues. In five of those six cases, all of which involved findings of constitutional violations or implementation of comprehensive remedies, the Supreme Court vacated and remanded the lower court decision. These include *Brennan v. Armstrong*, — U. S. —, 97 S. Ct. 2907, 53 L. Ed. 2d 1044 (1977) (per curiam); *School District of Omaha v. United States*, — U. S. —, 97 S. Ct. 2905, 53 L. Ed. 2d 1039 (1977) (per curiam); *Dayton School Board of Education v. Brinkman*, — U. S. —, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977); *Board of School Commissioners of City of Indianapolis v. Buckley*, 429 U. S. 1068, 97 S. Ct. 802, 50 L. Ed. 2d 786 (1977) (vacated and remanded in light of *Village of Arlington Heights v. Metropolitan Housing Development Authority*, 429

cision in this case prior to the issuance of three of the most recent Supreme Court decisions. *Dayton School Board of Education v. Brinkman, supra; District of Omaha v. United*

46. (Cont'd.)
U. S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) and *Washington v. Davis,* 426 U. S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)); and *Austin Independent School District v. United States,* 429 U. S. 990, 97 S. Ct. 517, 50 L. Ed. 2d 603 (1976) (vacated and remanded in light of *Washington v. Davis,* 426 U. S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). The issue in *Milliken v. Bradley,* — U. S. —, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977), the only Supreme Court decision affirming a lower court decision granting remedial relief, did not concern a comprehensive desegregation plan, but was limited to the propriety of compensatory educational programs as a desegregation remedy.

Of the remaining seven cases, one was the appeal from the three-judge court Order of June 15, 1976 in this case, which was dismissed for want of jurisdiction. *Delaware State Board of Education v. Evans,* 429 U. S. 973, 97 S. Ct. 475, 50 L. Ed. 2d 579 (1976). In the remaining six cases, certiorari was denied. None of the six involved findings of extensive constitutional violations, and only one concerned the propriety of a comprehensive desegregation remedy. *Board of Education of Jefferson County v. Newburg Area Council, Inc.,* 429 U. S. 1074, 97 S. Ct. 812, 50 L. Ed. 2d 792 (1977) (no abuse of discretion in remedying all vestiges of state-imposed segregation by requiring implementation of busing plan insuring that each elementary school in 20% black school system has black enrollment of between 12 and 40% and each secondary school of between 12.5 and 35%). Two of the cases were limited to discrete issues relating to remedies. *McDonough v. Morgan,* 429 U. S. 1042, 97 S. Ct. 743, 50 L. Ed. 2d 755 (1977) (no abuse of discretion in appointment of temporary receiver to insure compliance with desegregation plan); and *Cuthbertson v. Charlotte-Mecklenburg Board of Education,* 429 U. S. 831, 97 S. Ct. 92, 50 L. Ed. 2d 95 (1976) (complaint challenging pupil assignment based on race properly dismissed when assignments are product of remedial phase of school desegregation action). In one of the cases, no constitutional violation was found. *Board of Education of Independent School District No. 53 v. Board of Education of Independent School District No. 52,* 429 U. S. 894, 97 S. Ct. 253, 50 L. Ed. 2d 176 (1976). The remaining two cases in which certiorari was denied presented procedural questions in conjunction with desegregation consent decrees. *St. Louis Board of Education v. Caldwell,* — U. S. —, 97 S. Ct. 2987, 53 L. Ed. 2d 1100 (1977) (intervention); and *Young v. Midland Independent School District,* 430 U. S. 983, 97 S. Ct. 1680, 52 L. Ed. 2d 378 (1977) (mandamus).

States, supra; Brennan v. Armstrong, supra.[47] This is not to say that the subsequent Supreme Court decisions would have changed the conclusion of the Court of Appeals. At least, however, the Circuit Judges would have had the benefit of the most recent Supreme Court reasoning in this difficult area of the law and been able to interpret the cryptic and summary dispositions of earlier cases in light of the subsequent more extensive discussions. *See, e.g., Board of School Commissioners of City of Indianapolis v. Buckley,* 429 U. S. 1068, 97 S. Ct. 802, 50 L. Ed. 2d 786 (1977).[48]

These "complicating" factors do not bear directly on the issue of the probability of the defendants' petition being successful, as that standard has been interpreted above. They serve only to emphasize that the certiorari petition does present substantial and difficult questions of law. In light of the difficulty of the issues presented, the developing nature of the law in this area as applied to the instant case (and the apparently concerted effort by the Supreme Court to foster this development), and the threat of irreparable injury described earlier, it is concluded that the defendants have made the showing necessary to warrant entry of a stay, unless that showing is outweighed by the harm to the plaintiffs or to the public.

47. Although *Omaha* and *Brennan* were per curiam dispositions, all three decisions resulted in vacations and remands.

48. The Indianapolis case appears at first glance to be similar to the case at bar. Both courts found that virtually all the public housing projects had been built within the city limits of Wilmington and Indianapolis. *See United States v. Board of School Commissioners of City of Indianapolis,* 541 F. 2d 1211, 1222 (7th Cir. 1976). Further, there is a rough analogy, in terms of their effects on the city schools, between the Uni-Gov plan enacted by the Indiana legislature and the Educational Advancement Act. *See id.* at 1220-22. But there also is a critical distinction between the two cases. Here, unlike Indianapolis, the three-judge court found that *de jure* segregation had existed on an interdistrict basis prior to *Brown v. Board of Education, supra. Cf. id.* at 1227 (Tone, J., dissenting).

C. *Harm to the Plaintiffs*

The obvious and irreparable harm that the individual plaintiffs would suffer from entry of a stay is the continued delay in the vindication of their constitutional right to attend a unitary school system. The intervening Wilmington School Board similarly would be prevented from administering a unitary system. This Court has noted in the context of an earlier stay motion how serious it considers this injury.[49] Nevertheless, one factor mitigates this harm in some measure.

Plaintiffs do have the opportunity under the liberalized provisions of the voluntary transfer program to attend any other school system in the county except DeLaWarr.[50] This Court does not deem this option to be an adequate remedy to the constitutional violations found by the three-judge court. The program, however, does provide an opportunity for students so inclined to attend another school system already found to be unitary within itself. *See Evans v. Buchanan, supra*, 393 F. Supp. at 437, n. 19.[51]

When the conceded injury to the plaintiffs, viewed in light of this factor, is weighed against the showing made by the defendants of irreparable injury and the existence of substantial and difficult questions of law in this complicated and sensitive area of the law, the balance is a close one. Before resolving it, attention must be addressed to the final factor—the public interest.

D. *Public Interest*

The fourth factor to be evaluated in ruling on the motion for a stay is the public interest. Obviously, the

49. Transcript of Argument Held May 5, 1977 at 83-85.

50. As noted earlier, the liberalizing amendments to the transfer statute apply *only* to the 1977-78 school year.

51. *See supra* at A70-A71 n. 14 for an account of the number of students who have elected to transfer under the voluntary program.

individual plaintiffs are part of the public. Further, it cannot be gainsaid that every school child, white or black, should have the right to attend a unitary school system. The effects of *de jure* segregation are felt keenly by white students, although perhaps not as severely as black students feel them. But this does not end the analysis, for there are other considerations.

One is the interest of the public in a stable educational system. The right to attend a unitary school system is in part an end in itself, mandated by the Constitution. It is also, however, grounded in the premise that the educational interests of a child are best served by going to a desegregated school. The interests of a child, black or white, are not served, however, by subjecting his educational experience to the uncertainties of the judicial process. There can be little doubt of the significant disruption, both personally and educationally, that would occur if the one-district plan were reversed after implementation had begun. It is a cost incapable of accurate measurement, but it must be considered, however, crudely, in this Court's balancing process.

A related but distinct factor is the interest of the public in certainty. No one need be reminded of the sensitivity and social importance of the issues at stake in this litigation. Part of the tension and uneasiness that has afflicted this community during the past several years derives from the uncertainty about the practical effect this litigation would have on each individual's life. As with many other aspects of life, the uncertainty is very often more trying than dealing with the final result, no matter what that may turn out to be. It is quite clear that certainty in this case means a final disposition by the Supreme Court, either to deny or to grant the writ of certiorari and if the latter, hopefully, a decision on the merits. The grant of a stay may not affect directly the public's interest in certainty,

but the denial of a stay does increase public uncertainty because of the possibility of a subsequent reversal or vacation. While this interest in a final resolution like the others referred to above is not dispositive of the stay question, this Court must weigh its importance in arriving at a conclusion.

E. *Conclusion*

When the showing of irreparable injury and the merits of their appeal made by defendants is weighed against the harm to the plaintiffs and the interest of the public, the result is, not surprisingly, an exceedingly close question. I conclude, however, on the basis of the particular facts and considerations recited in this opinion, that a limited stay is warranted at this time. It is emphasized that this decision is not reached because of the administrative problems the State Board has stated would make very difficult the implementation of a one-district plan this fall. After having 14 months to develop a plan for the transition to a one-district school system, this Court is scarcely impressed by such protestations.

I believe that a stay of implementation of the one-district plan for grades 7 through 11 is justified, pending disposition of the writ of certiorari by the Supreme Court.[52] Necessarily, therefore, the transfer of authority to the New Board and the abolition of the 11 school districts also will be stayed. But that is all that will be stayed.

The State Board will be ordered to appoint the members of the New Board forthwith and to submit those names to the Court no later than August 10, 1977. Consistent with this Opinion and the mandate of the Third

52. Because of the disposition of this stay motion, references to September or fall 1977 in the Order of this Court entered on May 19, 1977 pursuant to mandate of the Third Circuit should be considered extended until further order of this Court.

Circuit, the New Board will be authorized to retain counsel to represent it in these proceedings and will be ordered to begin immediate development of a plan to desegregate grades 1 through 11 in the public schools of the 11 affected districts in September, 1978, and grades 1 through 12 in all subsequent years. The plan shall include both pupil and faculty assignments as well as the administrative hierarchy based on the one-district plan approved by the Court of Appeals. *Evans v. Buchanan, supra,* 555 F. 2d 373. For the reasons expressed in the May 19, 1976 opinion of the three-judge court, rising seniors will be exempted from the plan during the first year of implementation. *See Evans v. Buchanan, supra,* 416 F. Supp. at 360. Similarly, the discrete groups of students exempted from any desegregation plan by the three-judge court will not be included in the plan developed by the New Board. *Id.* at 360-61.

Further, pursuant to that mandate, the State Board of Education, the Department of Public Instruction and the school districts shall provide the New Board with whatever technical or other assistance the New Board deems necessary[53] and shall assign its highest priority to this responsibility. If any further extension or modification of the order of this Court entered pursuant to the mandate of the Third Circuit is necessary to carry out this responsibility, the State Board shall so inform the Court at the earliest possible moment. The New Board shall retain whatever experts or other support personnel it requires to complete its task. All expenses generated by the New Board shall be paid by the State Board and the existing school districts as provided in the mandate of the Third Circuit. The New Board shall file with the Court every two weeks beginning on August 19, 1977, a report on its progress. The

53. This includes delivering to the New Board any reports or other documents developed by the Interim Board during its existence.

report also shall state any problems the New Board has encountered where it believes the Court may be of assistance and shall detail the reasons for not seeking appropriate relief by motion.

The mandate of the Third Circuit contemplates that the New Board will be responsible for developing the desegregation plan and that the State Board primarily will draw up a time-table for the smooth transfer of authority to the New Board. These tasks are too inter-related, however, to permit each to proceed without close coordination with the other. Further, the mandate of the Third Circuit expressly requires the New Board to consider any planning neccessary for the transfer of power to it. Accordingly, the New Board shall submit its proposed plan to the State Board and Department of Public Instruction for professional evaluation and comments on its practical implementation. After receipt of that analysis, the New Board and State Board shall confer extensively and intensively to seek resolution of their differences. If no resolution is reached, the New Board shall submit its plan to the Court with a specification of the existing differences and reasons in support of its position. The State Board also shall specify its disagreement with the proposed plan and the reasons in support of its position. Both the plan and the list of differences and competing positions shall be filed no later than September 30, 1977.

Similarly, the State Board shall submit to the New Board its proposed time-table for the transfer of authority. After receipt of the New Board's comments, the two boards shall confer closely to resolve any differences. If any or all of the differences are not settled, the State Board shall submit to the Court its proposed time-table together with a list of the existing differences and the reasons for the position it has taken. The New Board also shall submit such a list and the reasons in support of its position. These submissions shall be made no later than September 30, 1977. Hearings on the New Board's plan and the State Board's time-table shall commence on October 18, 1977, unless the Supreme Court grants certiorari in the interim.[54]

The stay granted herein shall remain in effect until the Supreme Court has acted on the defendants' petition and for such time thereafter as the Court shall deem necessary, after considering the recommendation of the New Board, to accomplish the transition to a one-district unitary school system. Of course, if the Supreme Court grants the petition for writ of certiorari, the stay granted herein would continue in effect.

All provisions of the mandate, except those specifically stayed by this Opinion and accompanying Order shall remain fully in effect.

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54. The Court is aware that as of October 18, the Supreme Court may have taken no action on the defendants' petition. Nevertheless, on balance, given the history of the fourteen months since the three-judge court remedy opinion and what was not accomplished during that interval, it is obvious the task of dismantling the dual school system found to exist by the three-judge court can only be accomplished by vigorous pursuit of an appropriate remedy.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED JANUARY 9, 1978

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 1816-1822

BRENDA EVANS, et al.,
Plaintiffs,

v.

MADELINE BUCHANAN, et al.,
Defendants.

Joseph A. Rosenthal, Esq., and Irving Morris, Esq., of the law firm of Morris and Rosenthal, Wilmington, Delaware; and Louis L. Redding, Esq., Wilmington, Delaware, for individual plaintiffs.

Richard Allen Paul, Esq., of the law firm of Paul, Lukoff & Hurley, Wilmington, Delaware; Of Counsel, Louis R. Lucas, Esq., Ratner, Sugarmon, Lucas, Salky & Henderson, Memphis, Tennessee; Paul R. Dimond, Esq., of the law firm of O'Brien, Moran & Dimond, Ann Arbor, Michigan; William L. Taylor, Esq., Center for National Policy Review, Washington, D. C., for intervening plaintiffs.

Aida Waserstein, Esq., Wilmington, Delaware, for intervening Hispanic plaintiffs.

Hon. Richard R. Wier, Jr., Attorney General, State of Delaware, and Regina M. Small, Esq., Assistant Attorney General, State of Delaware; William Prickett, Esq., and Mason E. Turner, Esq., of the law firm of Prickett, Ward, Burt & Sanders, Wilmington, Delaware; Philip B. Kurland, Esq., Chicago, Ill., for defendant State Board of Education.

Edward W. Cooch, Jr., Esq., of the law firm of Cooch & Taylor, Wilmington, Delaware, for Marshallton-McKean School District.

Samuel R. Russell, Esq., of the law firm of Biggs & Battaglia, Wilmington, Delaware, for Alexis I. duPont School District.

William Poole, Esq., of the law firm of Potter, Anderson & Corroon, Wilmington, Delaware, for Alfred I. duPont School District.

James T. McKinstry, Esq., of the law firm of Richards, Layton & Finger, Wilmington, Delaware, for Claymont and Stanton School Districts.

John P. Sinclair, Esq., of the law firm of Potter, Anderson & Corroon, Wilmington, Delaware, for Newark School District.

Jerome O. Herlihy, Esq., of the law firm of Herlihy & Herlihy, Wilmington, Delaware, for Conrad Area School District.

Howard M. Handelman, Esq., and Jeffrey M. Weiner, Esq., of the law firm of Bayard, Brill & Handelman, Wilmington, Delaware, for New Castle County Vocational-Technical School District.

James M. Tunnell, Jr., Esq., and Richard Allen, Esq., of the law firm of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for Mount Pleasant School District.

David Anderson, Esq., of the law firm of Potter, Anderson & Corroon, Wilmington, Delaware, for New Castle-Gunning Bedford School District.

Thomas S. Lodge, Esq., of the law firm of Connolly, Bove & Lodge, Wilmington, Delaware, for DeLaWarr School District.

Sheldon N. Sandler, Esq., of the law firm of Bader, Dorsey & Kreshtool, amicus curiae, Delaware State Education Association.

Clifford B. Hearn, Esq., of the law firm of Balick & Hearn, P. A., Wilmington, Delaware, amicus curiae, Wilmington Federation of Teachers AFT AFL-CIO.

Henry N. Herndon, Esq., of the law firm of Morris, James, Hitchens & Williams, Wilmington, Delaware, for New Castle County Planning Board of Education, a non-aligned party.

Leonard L. Williams, Esq., and George E. Evans, Esq., Wilmington, Delaware, for Wendell Howell, member of New Castle County Planning Board of Education.

OPINION

Wilmington, Delaware
January 9, 1978.

SCHWARTZ, *District Judge*.

This opinion treats the few and relatively narrow remedial issues that remain for decision in this twenty year litigation, the more recent phase of which was initiated in 1971.* Those issues are: (1) What inter-district

* Published opinions or rulings on the current phase of this litigation in chronological order are: Evans v. Buchanan, 379 F. Supp. 1218 (D. Del. 1974); Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975); Buchanan v. Evans, 423 U. S. 963 (1975); Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1975); Evans v. Buchanan, 424 F. Supp. 875 (D. Del. 1976); Evans v. Buchanan, 555 F. 2d 373 (3d Cir.), *cert. denied*, 46 U. S. L. W. 3220 (U. S. Oct. 4, 1977); Evans v. Buchanan, 435 F. Supp. 832 (D. Del. 1977).

pupil assignment concept should be employed to extirpate the *de jure* segregation and dual school system in Northern New Castle County, the constitutional violation and scope of remedy having been determined and all appeals on those issues exhausted; (2) What ancillary relief is required to overcome the "continuing conditions of inequality produced by the inherently unequal dual school system" ** and vestige effects of *de jure* segregation never eradicated in Northern New Castle County; (3) What specific relief is required in the area of governance in light of past and continuing defaults by the State Legislature; (4) Whether this Court should retain continuing jurisdiction, and other future litigation matters. A summary of the procedural and factual background is necessary to place the matter presently before the Court in proper context.*

I. PUPIL REASSIGNMENT

A. BACKGROUND

The genesis of this case can be attributed to a matter styled *Gebhart v. Belton*, 33 Del. 144, 91 A. 2d 137 (1952). In that consolidated case, the Delaware Supreme Court ordered two districts ** to immediately admit black children plaintiffs into *de jure* all white schools. Upon review, the United States Supreme Court granted certiorari, combining *Gebhart* with other cases to formulate the historic *Brown v. Board of Education* saga.*** The Supreme

** Milliken v. Bradley, 97 S. Ct. 2749, 2762 (1977) (*"Milliken II"*).

* A more completely detailed summary of recent developments can be found in Doc. 668, App. A.

** The two, Claymont and Alexis I. duPont ("Alexis I"), are intervening suburban district defendants in the instant litigation. Alexis I. absorbed Hockessin, the defendant district in Gebhart v. Belton, *supra*.

*** Brown v. Board of Education, 347 U. S. 483 (1954) (*"Brown I"*); 349 U. S. 294 (1955) (*"Brown II"*).

Court affirmed but remanded *Gebhart*, mandating "a prompt and reasonable start toward . . . a transition to a racially non-discriminatory school system."[****]

In 1957, plaintiffs filed this action charging, *inter alia*, a failure to follow the mandate of *Brown*. Efforts to achieve the goal of *Brown* between 1958 and 1971 are chronicled elsewhere[*] and will not be repeated here.

In 1971, the present phase of this litigation was initiated. Subsequently the Wilmington Board of Education intervened as a party plaintiff with the State Board of Education and State Superintendent of Public Instruction remaining aligned as party defendants. In 1974, a three-judge court[**] made detailed factual findings and unanimously held the State Board of Education had failed to eliminate the *de jure* segregated school system which had previously existed in Northern New Castle County.[***] Concerned that suburban districts that might be affected by a final order lacked an adequate opportunity to be heard, the three-judge court invited them to intervene and present evidence on the issues raised by the amended complaint.[****] Although virtually all suburban boards accepted the invitation,[*****] the district boards presented no evidence, electing to adopt the State Board pleadings and stand on the existing record. Following briefing and

[****] 349 U. S. at 300-01.

[*] Evans v. Buchanan, 379 F. Supp. 1218, 1220-21 (D. Del. 1974).

[**] A three-judge court was impaneled pursuant to 28 U. S. C. § 2281 (repealed 1976) because plaintiffs had charged portions of the Delaware Educational Advancement Act of 1968, 14 *Del. C.* §§ 1001 *et seq.*, were unconstitutional.

[***] 379 F. Supp. 1218 (D. Del. 1977).

[****] 393 F. Supp. at 430. The court relied on Milliken v. Bradley, 418 U. S. 717, 754 (1974). (*"Milliken I"*).

[*****] The New Castle County Vocational Technical District, consisting of one high school, opted not to intervene because it accepts students from all of New Castle County.

oral argument, the three-judge court filed a second opinion[*] directing the submission of remedial schemes, including inter-district desegregation proposals. As earlier summarized by this Court, a majority of the three-judge court held that an:

> "inter-district remedy would be appropriate, based on its findings that:
>
> "1) there had been a failure to alter the historic pattern of inter-district segregation in Northern New Castle County;
>
> "2) governmental authorities at the state and local levels were responsible to a significant degree for increasing the [racial] disparity in residential and school populations between Wilmington and the suburbs;
>
> "3) the City of Wilmington had been unconstitutionally excluded from other school districts by the State Board of Education, pursuant to a withholding of reorganization powers under the Delaware Educational Advancement Act of 1968."

424 F. Supp. at 877. Defendants appealed to the Supreme Court, which summarily affirmed the three-judge court order.[**]

Following the Supreme Court summary affirmance, the three-judge court endeavored to develop a remedy to redress the inter-district constitutional violation. Three weeks of evidentiary hearings were held to evaluate the approximately nineteen proposals that were submitted.[*]

[*] 393 F. Supp. 428 (D. Del. 1975).

[**] 423 U. S. 963 (1975) (Rehnquist and Powell, JJ., and Burger, C. J., dissented).

[*] 416 F. Supp. at 335.

The schemes under consideration divided analytically into three groups: voluntary transfer, reorganization into different districts with a portion of the black minority population to be included within each district, and "mandatory assignment plans providing for the transfer and transportation of students among the existing districts."•• In May, 1976, after thorough consideration and articulation of additional findings of fact, the three-judge court rejected all proposals submitted.••• Recognizing that *Milliken v. Bradley*, 418 U. S. 717 (1974) (*"Milliken I"*) "makes plain that the remedy to be ordered must be commensurate with the scope of the violation which has been found,"•••• the three-judge court perceived that its "duty is to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred."••••• The court also noted that "where the violation found resulted in the operation of a dual school system, the Court must order the 'greatest possible actual degree of desegregation,' consistent with the practicalities of the situation. . . ."• Based primarily upon these *Milliken I* principles, the three-judge court stressed that the nature and scope of the constitutional violation required an inter-district remedy. It then defined the geographic area to be included with the desegregation scheme and noted that reorganization of the affected school districts would be required.

In the course of formulating its primary remedial decree, the three-judge court went to virtually unprecedented lengths to minimize federal court intrusion. In pursuit of

•• *Id.* at 336-37.

••• *Id.* at 350.

•••• *Id.* at 339 (footnote omitted).

••••• *Id.* at 341 (footnote omitted).

• *Id.* at 341.

its policy of nonintrusion, the district court deferred to the State Legislature to cure the constitutional violation both with respect to the scheme of reorganization and to issues of governance, noting that "[s]uch decisions are far better left to legislators and the process of compromise than to the rigors of judicial determination." •• In the event the Delaware Legislature defaulted, the three-judge court provided that the affected desegregation area should be one county wide system ••• governed on an interim basis by a five member board appointed by defendant State Board of Education and consisting of board members from the existing districts.•••• To promote an orderly transition to a unitary system, the three-judge court afforded the parties a fifteen month delay. Finally, the three-judge court allowed whatever constitutional pupil assignment plan was adopted by responsible State authorities to become effective in two stages with the first step, grades 7-11,• to be accomplished by September, 1977, and full compliance to be achieved with the commencement of the September, 1978 school year.

Certain defendants appealed the three-judge court order to the Supreme Court, with a protective appeal being lodged with the Third Circuit. On November 28, 1976, the Supreme Court dismissed the appeal for want of juris-

•• *Id.* at 352 (citing *Milliken I*, 418 U. S. at 744).

••• The Appoquinimink District in the extreme southern portion of New Castle County was excluded from the desegregation area.

•••• The three-judge court also permitted the Delaware General Assembly to alter the composition of the interim board. The Legislature thereafter swiftly increased the composition of the interim board to provide each affected district with representation on the board. Senate Bill No. 796, as amended by Senate Amendment No. 1 (June 25, 1976). *See* 424 F. Supp. at 878 n. 12.

• For an explanation of the treatment of students who would enter twelfth grade during the first year of desegregation (rising seniors), *see* text *infra*, at A159-A160.

diction.** Thereafter, the protective appeal was pursued before the en banc *** Court of Appeals. The Third Circuit divided four to three in upholding the three-judge court remedy order, except for one particular not presently germane. In affirming the three-judge court on scope of remedy, the circuit court majority adopted, endorsed, and furthered the efforts of the lower court to minimize federal intrusion, stating:

> "'[T]he district court stressed that 'the State Legislature and the State Board of Education may take such steps as are not violative of constitutional rights to change the pattern set here,' 416 F. Supp. at 357, and ordered creation of an interim board to operate the schools 'for so long as the State takes no action.' *Id.* We specifically affirm this governance plan and emphasize that prompt compliance by the state may take action by the interim board unnecessary."

555 F. 2d at 380-81. Regrettably, the State failed to act.*

On October 3, 1977, the Supreme Court declined to review the Third Circuit en banc determination by denying certiorari petitions filed by the State Board of Education and four suburban districts.**

In the hiatus between the Third Circuit affirmance of the three-judge court remedy order and the denial of certiorari by the Supreme Court, defendant State Board declined to endorse and bring before the Court any interim

** 429 U. S. 973 (1976).

*** Chief Judge Seitz and Judge Gibbons did not participate in the en banc court.

* For a full account of what did and did not transpire, see Evans v. Buchanan, 435 F. Supp. 832 (D. Del. 1977).

** Claymont, Newark, New Castle-Gunning Bedford, and Marshallton-McKean.

board pupil assignment proposal. Instead, the State Board, without benefit of implementing legislation, proffered a variant voluntary scheme known as "reverse volunteerism." Hearings concerning reverse volunteerism were conducted on July 19-25, 1977. Following the hearings and after consideration of an application for a stay of the three-judge court order, this Court on August 5, 1977 issued an Order and Opinion *** rejecting the concept of reverse volunteerism **** but granting a limited stay. The stay deferred implementation of the one district plan for grades 7 through 11 scheduled to commence in September 1977 pending disposition of the writ of certiorari to the Supreme Court. The stay decision also necessitated temporarily delaying transfer of authority to the New Board and abolition of the eleven school districts.

Although granting a limited stay, the Court ordered the State Board to appoint a five member new board as required by a May 19, 1977 order of this Court entered pursuant to the Third Circuit mandate. This new board was named the New Castle County Planning Board of Education ("NCCPBE" or "New Board"). Its primary responsibilities were to develop a complete desegregation scheme and to prepare and plan for the assumption of authority over the school system. The Court directed the NCCPBE to file its desegregation proposal on or before September 30, 1977. The NCCPBE timely filed its report, consisting of a majority report * addressing pupil assignment and other matters relating to the desegregation proc-

*** 435 F. Supp. 832 (D. Del. 1977).

**** Reverse volunteerism was rejected on both procedural and substantive grounds. For an explanation of the concept of reverse volunteerism and a more expansive discourse concerning its deficiencies, see text *infra*, A134-A135.

* NCCPBE Exh. 1. Four members of the five person NCCPBE endorsed the majority report.

ess and a minority report ** containing only a pupil assignment proposal. The majority report (10-2) contemplates the reassignment of all students from the geographic area of the two predominantly black districts to the geographic area of the predominantly white districts for ten years and the reassignment of all students from the geographic area of the predominantly white districts to the geographic area of the predominantly black districts for two consecutive years. The minority report (Plan W) generally assigns children on a random basis and attempts to minimize the average number of years that students from the geographic areas of the two predominantly black districts are reassigned to the geographic area of the predominantly white districts.

Hearings on the 10-2 majority and Plan W minority reports commenced on October 18, 1977 and terminated on November 8, 1977.* At an early stage, the Court perceived weaknesses in each submission and within certain fixed parameters directed the New Board to examine the feasibility of other alternatives. The NCCPBE responded by activating a six member Pupil Assignment Committee. The individual membership of that Committee were relieved of their regular duties by their respective districts.** The Pupil Assignment Committee labored diligently,***

** PX 15. The minority report was submitted by the Wilmington District representative of the NCCPBE.

* Doc. 663 (Transcript of Hearings of 10/18/77-11/8/77). On November 8th, over objection of plaintiffs who desired an earlier implementation date, the Court ordered that full implementation must be accomplished by September 1978. Doc. 638.

** Alfred I. duPont ("Alfred I."), Marshallton-McKean, Mt. Pleasant, New Castle-Gunning Bedford, Newark, and Wilmington.

*** Upon request, the Pupil Assignment Committee worked in the courthouse in an area adjacent to chambers. In order to be insulated from community and employer pressure, the group functioned under an order restricting communication. *See* Doc. 640.

completing its assigned task on November 21, 1977 and filing its special report with the New Board the following day.

The Pupil Assignment Committee report * declared that the alternatives examined were viable, given that certain noted concerns could be resolved.** The report detailed three alternative concepts and outlined variations to the illustrations. These concepts (9-3) contain the common standard of reassignment of all students from the geographic area of the predominantly black districts to the geographic area of the predominantly white districts for nine years and reassignment of all students from the geographic area of the predominantly white districts to the geographic area of the predominantly black districts for three consecutive years.

B. Roles of the Court and the NCCPBE

The NCCPBE initially expressed a preference for its original majority configuration and adopted "no position at this time upon any alternative. . . ." *** Hitherto unconvinced that Wilmington and DeLaWarr possess sufficient physical capacity to educate three grades of students, the NCCPBE has continued to withhold active support of the 9-3 concepts.* The legal stance of the NCCPBE is that

* Ct. Exh. 101A. The report utilized the same projected 1977-78 enrollment data upon which the original majority and minority reports were based. Doc. 695P, at 67-68 (Transcript of Hearings of 11/29/77-12/6/77) (Carey) (The Court did not receive the transcript of the last day of these hearings until 12/29/77).

** Ct. Exh. 101A, at 5. *See* text *infra*, at A126-A128.

*** Doc. 656. The statement apparently applies only to the 9-3 alternatives. The NCCPBE majority previously had demonstrated its dissatisfaction with Plan W.

* Doc. 667. The NCCPBE has stated, however, that "if . . . [capacity] concerns can be alleviated, the Board is fully prepared to implement a 9-3 plan." *Id.* 2.

because all pupil assignment concepts presently at issue satisfy the constitutional objective of conversion to a unitary racially non-discriminatory school system within the desegregation area,** the Court lacks authority to evaluate the fundamental fairness of the respective plans and concomitantly is bound by whichever concept the New Board endorses.*** This NCCPBE posture necessitates delineating the respective roles of the Court and the New Board.

The role of the Court in this narrow remedial phase of this litigation is limited. In *Milliken v. Bradley*, 97 S. Ct. 2749, 2757 (1977) ("*Milliken II*"), a *de jure* violation case, the Supreme Court emphasized that: "In the first case concerning federal courts' remedial powers in eliminating *de jure* school segregation, the Court laid down the basic rule which governs to this day: 'In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles.' *Brown v. Board of Education*, 349 U. S. 294, 300, 75 S. Ct. 753, 756, 99 L. Ed. 1083 (1955) (*Brown II*)." Instructing that "[a]pplication of those 'equitable principles' . . . requires federal courts to focus upon three factors," the Court stated:

> "In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U. S. at 16, 91 S. Ct., at 1276. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . . .' *Milliken I, supra*, 418 U. S., at 738, 94 S. Ct., at 3124. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' *Id.*, at 746, 94 S. Ct., at 3128. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that '[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems. . . .' 349 U. S., at 299, 75 S. Ct., at 756. (Emphasis supplied.) If, however, 'school authorities fail in their affirmative obligations . . . judicial authority may be invoked.'"

Id. (footnotes omitted). Finally, the Supreme Court noted that "[o]nce invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" *Id.*

Although *Milliken II* was primarily addressed to ancillary remedial relief, its explication of equitable considerations applies also to pupil reassignment.* In the present case, when the Supreme Court summarily affirmed the existence of an inter-district violation, "the condition alleged to offend the Constitution" was established. The remedial

** With respect to the NCCPBE majority plan (10-2), plaintiff asserts that it is constitutionally defective because the "process of adopting 10-2 *and* the very premises underlying 10-2 constitute either official racial discrimination standing alone or represent racially unacceptable discrimination in the remedial context." Doc. 668, App. B, at 1. As a result of the method of analysis employed, these constitutional questions are expressly left open. It is observed, however, that a plan may be so unfair as to constitute invidious discrimination. Allen v. Asheville, 434 F.2d 902, 905 (4th Cir. 1970).

*** Doc. 671, at 6: "[I]t is not for this Court to decide which of several possible plans is preferrable [*sic*] if each is constitutionally acceptable."

* *See Milliken I, supra;* Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971).

nature and scope of the decree was determined with finality by virtue of the denial of certiorari of the Third Circuit's affirmance of the three-judge court remedial order. With two components resolved beyond peradventure, remaining are only the directive that due regard should be afforded state and local authorities and the maxim that a district court has broad equitable power to remedy past wrongs. Application of these precepts to the issue of the amount of deference properly accorded the NCCPBE requires an examination of the unique status of that body.

The historical predecessor to the NCCPBE was a five person Interim Board appointed by defendant State Board of Education pursuant to the three-judge court May 19, 1976 remedy opinion.** In order to afford each district at least one representative, the Interim Board was expanded to thirteen members *** by the Delaware State Legislature pursuant to authority given that body by the three-judge court.* The Third Circuit understandably did not know of the subsequent expansion to thirteen members.** Accordingly, paragraph four of the circuit court's mandate called for the appointment of a five member board by the State Board of Education in the event local officials failed to promptly act.***

** 416 F. Supp. 328 (D. Del. 1976).

*** *See* n. **** *supra*, p. A105.

* 416 F. Supp. at 357.

** The Third Circuit was reviewing only the June 15, 1976 three-judge court primary remedial order. As such, the circuit court's record probably did not contain any reference to legislative action occurring subsequent to June 15, 1976.

*** 555 F. 2d at 381. Paragraph four of the circuit court's mandate was virtually a verbatim restatement of the three-judge court decree. Relying on the system of reorganization contemplated by the State of Delaware Educational Advancement Act, the three-judge court decided on a board of five members. Although recognizing that each existing board would not be directly represented, the court preferred to follow state law rather than devise an independent means of selection. 416 F. Supp. at 357-58.

Following the failure of the State to act in accordance with the Third Circuit mandate,**** this Court directed defendant State Board * to appoint the five member "New Board." **

Against this procedural background, attention is turned to the primary contention of the NCCPBE that it has broad discretion which cannot be disturbed because its 10-2 concept accomplishes the constitutional objective of transition to a racially non-discriminatory unitary school system in the desegregation area. The NCCPBE reaches this conclusion by claiming the status either of a court-appointed master whose choice of pupil assignment concept can only be disturbed under the clearly erroneous test of F. R. Civ. P. 53(e)(2),*** or of a full fledged school board vested with broad discretion in formulating a remedy.

That the NCCPBE is a court-appointed master pursuant to Rule 53 is a wholly untenable proposition. First and foremost, the membership of the NCCPBE was appointed by defendant State Board of Education, not by

**** Paragraph 2 of the Third Circuit order provided that the 11 districts "shall be reorganized into a new or such other new districts as shall be prescribed by the state legislature or the State Board of Education, so long as such prescription . . . eliminat[es] the dual school system . . . and the vestige effects of de jure segregation." 555 F. 2d at 381. Paragraph 4 became relevant only upon default by state officials with respect to paragraph 2. For a full explanation of what occurred, see Evans v. Buchanan, 435 F. Supp. 832 (D. Del. 1977).

* The membership of the State Board is appointed. *See* 14 *Del. C.* § 101(b).

** 435 F. Supp. at 848. The New Board subsequently adopted the name "New Castle County Planning Board of Education." (NCCPBE).

*** F. R. Civ. P. 53(e)(2) provides in pertinent part:

> "(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

the Court. Not surprisingly, no authority has been cited or found that provides for the power of appointment of a master under F. R. Civ. P. 53 inhering to a party litigant. A fortiori, no authority has been found for the astounding proposition that under the clearly erroneous standard of F. R. Civ. P. 53(e)(2), a federal court is bound by factual findings of a "master" appointed by a party defendant. Second, although F. R. Civ. P. 53(b) contemplates issuance of an order of reference to establish the exceptional condition requiring a master, no such step was taken here. Third, the mandate of the Third Circuit and the August 5, 1977 order of this Court instructing the NCCPBE to develop a plan for desegregation in no way authorize the NCCPBE to make findings of fact binding on this Court.* *Cf. Morgan v. Kerrigan*, 530 F. 2d 401, 411 n. 13 (1st Cir.),

* Illustrative operative paragraphs of this Court's August 5, 1977 Order are:

"4. Immediately upon appointment, the New Board shall begin to develop a plan for the desegregation of the public schools in the area . . . in September, 1978 in accordance with the Opinion of the Court of Appeals for the Third Circuit. . . . The New Board shall commence immediately to consider any planning necessary for the transfer to it of operating authority.

* * * *

"7. As described in the Opinion issued this date in the above-captioned matter, the New Board shall submit its plan for the operation of a unitary school system to the State Board of Education for evaluation and comments with respect to the practical implementation of the plan . . . After receipt of said evaluation and comments, the New Board and State Board of Education shall confer intensively and extensively to resolve any differences over implementation of the New Board's plan. Should any dispute prove irresolvable, the New Board shall submit to the Court its plan together with a statement of the disputes outstanding and the reasons in support of its position. The State Board of Education also shall submit to the Court a statement of the disputes outstanding and the reasons in support of its position with respect to the practical implementation of the plan."

cert. denied, 426 U. S. 935 (1976) (Boston masters not empowered to make findings of fact). Consequently no legitimate basis exists for concluding that the NCCPBE is a master for purposes of F. R. Civ. P. 53.

The NCCPBE's contention that it should be considered a body politic, *i.e.*, a school board, is premised upon the derivation of its manner of appointment * and the explicit requirement that the NCCPBE function as a school board. If the NCCPBE were truly a body politic created through democratic processes, its position would be entitled to considerable deference because "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems" ** and no other comparable means exist "to take into account the interests of state and local authorities in managing their own affairs. . . ." ***

The NCCPBE position contains two basic fallacies, one factual and the other legal. The factual fallacy is that the NCCPBE is not a true body politic. It was not elected by popular vote as are nine of the eleven litigant school boards.**** At most, it represents the best efforts of the three-judge court and the Third Circuit to establish a governance unit in a fashion in accordance with the legislative will. But the State of Delaware through its General Assembly expressly disowned and disavowed the NCCPBE

* As previously noted, the three-judge court attempted to reconcile the appointment process with the Educational Advancement Act of the State of Delaware. Thus the NCCPBE has argued that it was appointed in a manner appropriate under Delaware law and that, accordingly, it should be regarded as would be any other duly constituted school board. Doc. 671, at 5.

** *Brown II, supra*, 349 U. S. at 299.

*** *Milliken II, supra*, 97 S. Ct. at 2757.

**** The board of Alexis I. is appointed by the Resident Judge of the Superior Court for New Castle County. 14 *Del. C.* § 1062(a). The Wilmington School Board is also appointed. 14 *Del. C.* § 1063.

and its 10-2 proposal.* In addition, defendant State Board of Education initially declined to pay its court-ordered share of expenses of the NCCPBE.* Thus the present judicially created and defendant appointed five person NCCPBE cannot be said to be a body politic representing the will of the people through its duly elected Legislature.

In contrast to the above, the five cases** primarily relied upon by the NCCPBE are inapposite because all involved school boards that were bodies politic existing by virtue of the democratic processes. The judicially created and defendant appointed NCCPBE expressly disavowed by the Delaware Legislature is not the usual body politic found in any desegregation case cited by any interested party or uncovered by the Court in its own research. Thus the Court declines to accept and/or approve unbridled discretion by the NCCPBE. Because the NCCPBE is factually and legally not a body politic, its position that "the Board's choice of plans can only be rejected by this Court if the result is constitutionally defective" * is disapproved.

Although the NCCPBE is neither a master nor a full fledged body politic, its presence is vital to successful implementation of a desegregation plan in New Castle County. Occupying a unique role heretofore unknown in

* PX 23, Senate Joint Resolution No. 29, passed on October 13, 1977, reads as follows:

"WHEREAS, in the litigation known as *Evans v. Buchanan*, it is understood that the United States District Court for the District of Delaware ordered the State Board of Education of the State of Delaware to appoint a five-person new Board to plan for the implementation of an almost county-wide School District in New Castle County in connection with an Order of that Court which provides for, among other things, the elimination of eleven public school districts created under the authority of the General Assembly of the State of Delaware and their replacement by the Court-created single almost county-wide public school district; and

"WHEREAS, the new Board was so appointed and we understand it has presented to the Court such a plan; and

"WHEREAS, the 129th General Assembly of the State of Delaware does not recognize said new Board to be a duly constituted and representative Board of Education under the laws of the State of Delaware;

"NOW, THEREFORE:

"BE IT RESOLVED by the members of the 129th General Assembly of the State of Delaware, the Governor concurring therein, that the findings, recommendations, policies and other actions of the five-person Planning Board appointed by the State Board of Education *are not actions or findings of the State of Delaware or any local school district in New Castle County,* notwithstanding any statement, rule or regulation of the State Board of Education to the contrary; and

"BE IT FURTHER RESOLVED that *the action and policies of the New Castle County Planning Board of Education are not endorsed by the State of Delaware* and that unless the General Assembly takes effective action in support of any such actions or policies said actions and policies shall have only such force as they receive from orders of the United States Courts." (emphasis added).

* PX 11. The pertinent portion of the refusal is contained in a September 15, 1977 letter from Kenneth C. Madden, State Superintendent of Public Instruction, to the Chief Administrator of the NCCPBE:

"I am sure that you are aware that we did not receive a legislative appropriation for expenses of the New Board for this fiscal year and that it will be necessary for us to receive

* (Cont'd.)

such appropriation before we can make our contribution. We plan to submit a request for a supplemental appropriation at the earliest possible time when the legislature is in session."

After this matter was brought to the attention of the Court, the State Board of Education immediately found the necessary funds without benefit of a legislative appropriation. *See* Doc. 663H, at 3-9.

** Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra,* 402 U. S. at 16; Darville v. Dade County School Bd., 497 F. 2d 1002, 1004 (5th Cir. 1974); Pride v. Community Sch. Bd. of Brooklyn, 488 F. 2d 321, 327 (2d Cir. 1973); Allen v. Asheville, *supra,* 434 F. 2d at 905; Moss v. Stamford Bd. of Educ., 356 F. Supp. 675 (D. Conn. 1973).

* Doc. 671, at 6.

the annals of desegregation litigation, the New Board is the only body empowered to govern the schools which has proposed a solution capable of effectuating a transition to a racially non-discriminatory unitary school system. Further, the NCCPBE has demonstrated its resolve to retain an open mind by stating it is "fully prepared to implement a 9-3" concept if the same can be effectively achieved under a specific pupil assignment plan.* Additionally, the NCCPBE willingly acquiesced in a procedure to protect its Pupil Assignment Committee from all outside influence. Given the high level of developed expertise and the demonstrated impartiality of the Pupil Assignment Committee, the Court is satisfied that the unique NCCPBE shows preliminary promise of working well in the area of pupil assignment. Equally important is the fact that the NCCPBE is going to be the responsible operating authority for the single unitary non-discriminatory school district. For these reasons, the Court must and wants to consider all helpful, well-reasoned, and documented conclusions of the maturing NCCPBE. Although not bound by the conclusions of that group, so long as the NCCPBE continues to seek responsible solutions in an impartial manner, its input will be accorded increasing weight by the Court in the exercise of its equitable power.**

* Doc. 667. A computer print-out of necessary data for a detailed pupil assignment plan was expected on December 23, 1977. Upon instructions from the NCCPBE and, dependent upon those instructions, the Pupil Assignment Committee will presumably begin its work in January and require approximately eight weeks to make a specific fit by student and school. Ct. Exh. 101A, at 11.

** Minority board member, Wendell Howell, has described the workings of the NCCPBE as a process to determine "who gets how much of what . . . ." Doc. 663F, at 59. However true in the past, the Court is satisfied the NCCPBE is turning its full attention to what I regard as its primary responsibility—assuring high quality racially non-discriminatory public school education for all children within the desegregation area.

C. Proposed Concepts Before the Court—Description

Any pupil assignment concept intended to remedy the continuing inter-district violation must necessarily consider the composition and distribution of the student body throughout the desegregation area and the physical limitation of building capacity.* Thus, if the total number of children in the predominantly white districts** were mirrored in all important respects by the same total number of children in the predominantly black districts,*** the burden of pupil reassignment theoretically could, but not necessarily would, be distributed evenly between the two groups with each being reassigned six years. But this theoretical mathematically equal disbursement of student population does not exist in Northern New Castle County. The two predominantly black districts of Wilmington and DeLaWarr contain in the aggregate far less student population* and, consequently, far less building capacity than

* Other permissible considerations include such matters as: desirability of retention of feeder patterns, programmatic needs, requirements of special education, economics of a facility, and need for flexibility. An impermissible consideration would be use of racial quotas; therefore, no attempt herein was made to secure a particular racial balance in any school, grade, or classroom. Doc. 663A, at 41 (Magat). *See* Evans v. Buchanan, 555 F. 2d 373, 380 (3d Cir.), *cert. denied*, 46 U. S. L. W. 3220 (U. S. Oct. 4, 1977).

** Alfred I., Alexis I., Claymont, Conrad, Marshallton-McKean, Mt. Pleasant, New Castle-Gunning Bedford, Newark, and Stanton.

*** DeLaWarr and Wilmington. Reference to predominantly black districts and predominantly white districts is to currently existing districts. Of course, at the end of the desegregation process under existing judicial decrees there will be only one district with a racially non-discriminatory school system.

* The September 30, 1977 enrollment census indicates that in the desegregation area there are a total of 72,590 public school students in grades K-12 including vocational and special schools. Of this number, between 21.69% and 22.5%, and conceivably 22.95%, dependent upon how one adjusts for voluntary transfer students, *see* nn. *-* *infra*, pp. A133-A134, live in the predominantly black districts. *Compare* PX 26 *with* D. P. I. Exh. 4 *and* D. P. I. Exh. 11. Of the 72,590 students, 16,187 or 22.3% are black, the overwhelming majority residing in Wilmington or DeLaWarr. D. P. I. Exh. 4.

the aggregate student population and building capacity of the nine predominantly white districts.** Accordingly, plaintiffs accept that under any desegregation plan "black children on the average will be reassigned to [what will be formerly racially identifiable] white schools a greater number of years than white children will be reassigned to [what will be formerly racially identifiable] black schools."*** Given that the children from the predominantly black districts will be reassigned to the predominantly white districts for a significant portion of their education, the difference between the litigants centers primarily upon how much of the disproportionate impact of pupil reassignment above that dictated by numbers and building constraints should be borne by the minority whose constitutional rights were violated.

Five proposed concepts are before the Court, two advanced by the NCCPBE and three submitted directly by the Pupil Assignment Committee: 1) The concept favored by the majority of the NCCPBE—the "10-2" configuration; 2) The concept endorsed by the minority member of the NCCPBE—"Plan W"; 3) A 9-3 configuration labelled the "S" concept, bottomed upon pairing elementary attendance zones in the Wilmington district with elementary attendance zones in eight predominantly white districts; 4) A 9-3 configuration utilizing an Independent Feeder ("IF") concept, which can be overlaid on any of the "S" concept illustrations; 5) A-93 configuration termed the "G" concept, predicated upon pairing grids * within

** The seating capacity in the predominantly black district was estimated roughly during hearings to be 20,000. Doc. 663A, at 85 (Magat).

*** Doc. 668, at 7.

* A grid is a word that has evolved to accommodate computer application to various problems. Any given area is "gridded" by dividing it into small contiguous zones. A grid is one of those small zones. In this case, the entire desegregation area has been

the Wilmington district with elementary attendance zones in eight prdominantly white districts.

Four of the five concepts presented divide the desegregation area geographically into four attendance zones.** Plan W employs nine clusters. Apparently fortuitously, all concepts pair the DeLaWarr district with the New Castle-Gunning Bedford district, treating the combined geographic area as a distinct entity. As a necessary corollary, all concepts in one form or another have paired or clustered Wilmington with the remaining eight predominantly white districts.*

1. *The NCCPBE Majority Proposal—The 10-2 Concept*

The NCCPBE 10-2 majority concept reassigns all students from the two predominantly black districts to the predominantly white districts for ten years and all students from the predominantly white districts to the predominantly black districts for two consecutive years. The 10-2 concept anticipates retention of a minimum of ten grades in each of the predominantly white districts and limits Wilmington to grade centers of two years spanning grades 5 through 9 and DeLaWarr to eight and ninth grades. As a consequence, under the NCCPBE majority 10-2 con-

* (Cont'd.)
gridded and a census thereafter applied to reflect racial composition of each grid. A grid is also known and has been referred to in trial testimony as a "geocode".

** The four attendance areas are: Attendance Area I, consisting of a portion of Wilmington and the present Claymont, Mt. Pleasant, and Alfred I. districts: Attendance Area II, embracing another portion of Wilmington and the Alexis I., Conrad, Marshallton-McKean, and Stanton districts; Attendance Area III, composed of the remaining portion of Wilmington and the Newark district; and Attendance Area IV, pairing the DeLaWarr district with the New Castle-Gunning Bedford district.

* Alfred I., Alexis I., Conrad, Claymont, Marshallton-McKean, Mt. Pleasant, Stanton, and Newark.

figuration all Wilmington and DeLaWarr children in grades 1 through 4, 10 through 12, and three other consecutive grades must necessarily attend schools located in the predominantly white districts. A concomitant result is that none of the high schools in the predominantly black districts is used as a high school.

2. *The NCCPBE Minority Proposal—Plan W* *

The NCCPBE minority proposal seeks to minimize the disproportionate impact upon black students during the transition from a dual system to a unitary racially nondiscriminatory system by maximizing utilization of Wilmington school facilities. Recognizing that limitations on physical capacity of Wilmington schools preclude anything approaching a 6-6 plan,** Plan W endeavors to increase the average time that black students spend in their home district to something more than three, but less than four years.*** Dividing the desegregation area into nine

* Defendant State Board and all intervening defendant predominantly white districts objected to presentation of the NCCPBE minority concept. The objectors variously asserted the Court was limited by the Third Circuit mandate, 555 F. 2d at 382, to consideration of whatever the NCCPBE majority might offer and that the NCCPBE minority proposal was in reality a Wilmington district proposal. *See* Doc. 663A, at 12-22. Evidence on Plan W was admitted over objection and with full opportunity for cross-examination.

** Circumscribing a discrete area within the predominantly white districts containing a number of white children equivalent to the number of black children in Wilmington and DeLaWarr would allow a total exchange of students (an assignment of white children for six years in the formerly black schools and an assignment of black children for six years to the formerly white schools). But because the New Board's preference is to involve everyone throughout the defined desegregation area in the pupil reassignment scheme, assignments of six years for both black and white children are not mathematically possible.

*** Specifically, plaintiffs embracing Plan W recognize that capacity limitations in the two predominantly black districts com-

clusters and randomizing assignment patterns of both white and black students, Plan W results in a significant number of students from the predominantly white districts never being assigned to a predominantly black district.* Other children from the predominantly white districts are assigned out of their former school districts for a minimum of two years to a maximum of seven years,** whereas students from the predominantly black districts attend a predominantly white district for a minimum of 5 years to a maximum of 10 years.*** Finally, the NCCPBE minority concept purports to enhance walk-in use of three regional high schools.****

*** (Cont'd.)
pel the conclusion based on full utilization at state rated capacity that "students from the two [predominantly] black districts on the average would be reassigned to [what will be formerly racially identifiable] white schools for about 8.3 years and students from the nine [predominantly] white districts reassigned to [what will be formerly racially identifiable] black schools for about 3.7 years." Doc. 668, at 8.

* For example, of 7,836 children from the Alfred I. district (NCCPBE Exh. 6), 4,735 would not be assigned to predominantly black districts, although other children from that area would be so assigned for up to four years. NCCPBE Exh. 21; PX 15; PX 19.

** Children in the present Alexis I. District would be assigned out of their district anywhere from 2-6 years; Claymont 3-7 years. PX 15; PX 19. Ordinarily, a child would not attend a Wilmington school for more than four years; however, some additional time may be spent in other than the home district as a result of a "lateral transfer". PX 15; PX 19. In the context of this litigation, a lateral transfer results when even though a child from a predominantly white district remains in attendance in a predominantly white district, the child does not attend the school he or she would have been expected to attend. A lateral transfer can occur within what are now predominantly white districts or across predominantly white district lines. The latter type of lateral transfer would occur under Plan W.

*** PX 19.

**** Designated are the two Wilmington high schools, Wilmington High School and P. S. duPont High School, and predominantly white Mt. Pleasant High School.

3. *The 9-3 "S" Configuration.*

In undertaking to determine the feasibility of a 9-3 configuration, the NCCPBE through its Pupil Assignment Committee considered the following questions:

> "1. Is it possible to develop a plan which assigns suburban children to schools in Wilmington and De La Warr for three years and Wilmington and De La Warr children to suburban districts for nine years?
>
> "2. Can Wilmington and/or P. S. duPont High Schools be used as a grades 10-12 center? If yes, what plan results?
>
> "3. Can De La Warr High School be used as a grades 10-12 center? If yes, what plan results."

Ct. Exh. 101A, at 4.

The Pupil Assignment Committee also employed another formulation to describe a part of their task:

> Using three-grade centers and assuming that all students throughout the eleven districts are treated equally between rather than within racial groups to the fullest extent feasible, what plan results? Can P. S. and/or Wilmington High School remain open as feeder high schools?*

In responding to the above questions, the Pupil Assignment Committee also considered whether a 9-3 concept was feasible while retaining certain distinctive characteristics of the 10-2 proposal. Consequently, the committee investigated whether a 9-3 configuration was possible if no Wilmington or DeLaWarr high school was

* Ct. Exh. 107.

used as a high school and the primary grades were offered only in the predominantly white districts. The response of the Committee came in the form of various illustrations and alternates. All demonstrate that a 9-3 concept is feasible provided noted concerns can be resolved.*

The three S illustrations (S_1, S_2, and S_3) and their alternates employ existing elementary attendance zones in all districts as the basic desegregation tool. In addition, the Pupil Assignment Committee in developing the three S concepts imposed upon itself certain perceived educationally sound assumptions and constraints.**

* Ct. Exh. 101A, at 5.

** "1. No students in grades 1-3 should be assigned to buildings constructed as middle or high schools.

"2. No students in grade 7 or above should be assigned to elementary school buildings.

"3. Middle schools or junior high schools (buildings currently housing grade patterns between 5 and 9) can be used to house grade spans 4 through 9.

"4. Kindergarten students should be housed in neighborhood elementary schools and should be counted as half-time students.

"5. No high school student (grades 10-12) should be assigned to any building which was not constructed as a high school.

"6. No high school (grades 10-12) should have a student enrollment of less than 600 students, with the preference being not less than 750 students. These minimum enrollments are based on the lowest existing high school enrollments in the desegregation area of New Castle County and represent what the committee feels is the minimum number of students necessary to provide a comprehensive high school program.

"7. Wilmington students, especially in the elementary grades K-6, should be as close to "home" as possible when assigned to city schools for the 3-grade span.

"8. Suburban-city feeder patterns should remain intact whenever possible."

The Pupil Assignment Committee also noted that:

"When tested against the data, assumptions 7 and 8 above tend to be in conflict. Configurations which rigorously adhere

The S_1 illustration demonstrates the fit of a 9-3 configuration if all young elementary children and high school students attend school in the predominantly white districts.* The alternates to S_1 demonstrate the feasibility of a 9-3 concept using one * of the Wilmington high schools as a high school in conjunction with an Attendance Area II high school.

The S_2 model includes early elementary grades by providing for different three year grade spans to be assigned from each of three attendance areas.** Accordingly, grades 1-9 are offered in Wilmington. The S_2 alternate illustrates the feasibility of using a Wilmington high school as a high school in conjunction with Attend-

** (Cont'd.)
to feeder patterns do so at the expense of school proximity. This dichotomy exists because of the following data considerations:

> "(a) The total capacity of Wilmington schools within each attendance area is not sufficient to house any single 3-grade span within its area under assumptions 1, 2 and 3, except for grades 4-6 in Attendance Area 3.
>
> "(b) Schools in adjoining attendance areas can be used as "overflow" buildings if an adjoining area is on a different 3-grade span (elementary as opposed to secondary).
>
> "(c) Any 9-3 configuration based on present elementary feeder patterns must therefore utilize facilities outside its own attendance area."

Ct. Exh. 101A, at 13-14. This conflict between strict adherence to feeder patterns and school proximity also arises in the 10-2 proposal with respect to children in Wilmington. Doc. 663A, at 53-54 (Magat).

* The NCCPBE majority 10-2 plan employed a grade span of 5 through 9 in the predominantly black districts. The S_1 concept uses a grade span of 4 through 9.

* The Pupil Assignment Committee perceived that one could not utilize both Wilmington high schools as 10-12 grade centers under the alternates to S_1, S_2, and S_3. Doc. 695P, at 147-50 (Carey); Ct. Exh. 101A, at 17.

** Attendance Area I (7-9); Attendance Area II (1-3); and Attendance Area III (4-6).

ance Area I high schools. Several possibilities emerge for designating one city high school as a 7-12 or 10-12 grade center in a pairing arrangement with a junior high school and senior high school in the predominately white districts.

Also resulting in a grade span of nine years in Wilmington, the S_3 illustration modifies S_2 by exchanging the grade spans which Attendance Areas I and III send to Wilmington. The S_3 alternate employs an Attendance Area III high school as a 7-12 grade center to permit one of the Wilmington high schools to be used as a similar grade center.

The primary concerns expressed by the Pupil Assignment Committee with respect to the S concept are possible overutilization of schools, particularly in Wilmington, and the conflict between strict retention of feeder patterns and the desirability of assignments to nearby schools.* Underutilization of some facilities was also noted by the Committee as a matter of some concern.**

4. *The 9-3 "IF" Configuration*

Unlike the S concepts which utilized existing elementary attendance zones and the four attendance areas created by the NCCPBE, the Independent Feeder ("IF") concept combines some of the so called grids or geocodes of predominantly white Alexis I and Conrad with geocodes of Wilmington. Feeding the children from designated residential tracts of Wilmington High School for their high

* S_3 manifests rigorous adherence to feeder patterns and has the effect of placing children outside their attendance areas when they return to Wilmington. S_2 attempts to retain feeder patterns but fails to a slight degree. S_1 breaks feeder patterns to return children to area schools.

** Underutilization of some facilities is an inherent problem in all presented concepts. The problem is caused by declining enrollment, unrelated to and largely independent of the instant litigation. *See* text *infra*, at A144.

school experience, the IF concept may be viewed as carving out an additional attendance area consisting of five schools which collectively provide a full 1-12 grade span.

The Pupil Assignment Committee concluded it was possible to superimpose the IF illustration on any of the S illustrations. Although noted concerns would not appreciably change for any of the S illustrations, the self-contained IF area as distinguished from its larger attendance area would have a less serious problem with over-utilization, no problem with underutilization, and could be easily expanded or contracted by adding or subtracting geocodes. Aside from the obvious drawback of limited application in the desegregation area, the IF approach evoked some concern over lateral transfers between districts in the predominantly white Alexis I. and Conrad districts.* Although the matter was not explored fully, a cursory review of the IF concept as applied to P. S. du-Pont High School convinced the Pupil Assignment Committee such an arrangement was not feasible because of inability to obtain sufficient students without going beyond the physical location of predominantly white high schools. Finally, the Pupil Assignment Committee was unable to predict compatibility of the IF concept with the third 9-3 configuration, the G concept.

5. *The 9-3 "G" Concept*

The G concept combines geocodes in Wilmington with elementary attendance areas in the predominantly white districts.** Use of geocodes necessarily results in new

* Because lateral transfers pervade the IF concept, some view IF as an undesirable scheme that isolates five schools from the area as a whole.

** With the exception of the limited IF proposal, none of the concepts before the Court attempts to combine geocodes in Wilmington with geocodes of the predominantly white districts. Em-

elementary attendance zones in Wilmington. Specifically, three elementary attendance area zones emerge, conforming to Attendance Areas I, II and III of the 10-2 plan. Comparison of the new geocoded elementary attendance zones in Wilmington with the existing Wilmington elementary attendance zones immediately reveals the geocoded elementary attendance zones to be far more compact. As a result, Wilmington students are able to attend schools close to their homes during their three years in Wilmington. Employing geocodes to establish elementary attendance zones derives other advantages enumerated in a later section of this opinion.*

6. *Attendance Area IV*

The geographic area comprising the DeLaWarr and New Castle-Gunning Bedford districts is considered a separate Attendance Area under each of the proposed concepts. Under the NCCPBE majority 10-2 proposal, grades 8 and 9 attend three of the five DeLaWarr schools; * grades 1 through 7 and 10 through 12 are offered only in the pre-

** (Cont'd.)
ployment of geocodes can cause a student to attend a school other than that which he would otherwise attend (lateral transfer). Lateral transfers were a matter of concern among the predominantly white districts because of the tendency at this point in time for identification with one's district. In a one district governance unit, this concern likely will dissipate with time. If this assumption proves correct, the NCCPBE at some future point may find it desirable to assign students in the predominantly white districts to schools closer to their homes and thus achieve transportation cost savings. Because unnecessary lateral transfers between predominantly white districts neither aid nor impede the conversion to a non-discriminatory unitary school system, the matter is properly left to the NCCPBE.

* *See* text *infra*, at A143-A144, A151.

* DeLaWarr High School, Eisenberg Middle School, and Colwyck. Rosehill and Dunleith are left "open to assignment", creating a concern that they will be closed.

dominantly white New Castle-Gunning Bedford District. Plan W, by attempting randomization of pupil selection and proposing utilization of DeLaWarr High School as a regional high school, attempts to minimize the disproportionate burden borne by children in DeLaWarr.

The 9-3 feasibility study also pairs the predominantly black districts of DeLaWarr with the predominantly white district of New Castle-Gunning Bedford to form Attendance Area 4. Within that precept, three options are enumerated. Under option 1, only grades 4-6 are provided in DeLaWarr; under option 2, grades 4-6 and 10-12 are offered in DeLaWarr; and under option 3, DeLaWarr would house grades 1-9. Option 3 strives to attain a better "fit" by splitting the geographic area of DeLaWarr into two subdivisions ** and treating one portion as though it were within the predominantly white district of New Castle-Gunning Bedford. In so doing, option 3 reduces DeLaWarr to two elementary school buildings and one high school building. As in option 1, all students in Attendance Area IV then attend only grades 4-6 in the "revised" DeLaWarr District.

D. Merits of the Proposed Concepts

The foregoing plans having been submitted to the Court, its duty is to review these proposals against the principles enunciated by the Supreme Court and the Third Circuit. Under the mandate of *Brown I, supra,* the duty of the Court is to insure the elimination of the inter-district racially discriminatory dual school system that has persisted in New Castle County. *Evans v. Buchanan,* 379 F. Supp. 1218 (D. Del. 1974), and 393 F. Supp. 428 (D. Del.), *summ. aff'd.,* 423 U. S. 963 (1975). In formulating

** The dividing line is Interstate Route 295, a major highway artery which intersects the present DeLaWarr District.

the appropriate remedy to redress the systemwide violation, the three-judge court relied heavily on the guidance provided by *Milliken I, supra,* and *Swann, supra.* Elucidating upon the basic tenet that "the nature of the violation determines the scope of the remedy", *Swann,* 402 U. S. at 16, the Supreme Court in *Milliken I* cautioned that the effort "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" does not constitutionally require "any particular racial balance in each 'school, grade, or classroom'." 418 U. S. at 740-41 (quoting *Swann,* 402 U. S. at 24). Noting its acceptance of desegregation plans rendering schools more than 50% black,* the Supreme Court stated that such results are not offensive to the Constitution and do not justify an inter-district remedy where only an intra-district violation has been identified. Where, however, the constitutional violation is of systemwide magnitude and an inter-district remedy is mandated, attention must be focused on whether the remedial process is governed by the appropriate exercise of equitable power. At this stage, one becomes mindful that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann,* 402 U. S. at 15.

Because the inter-district extent of the violation and the inter-district scope of the remedy have previously been confirmed in this case, the limited remaining judicial task is to assure and effectuate implementation of a scheme that eliminates the dual school system and extirpates the

* Racial compositions of 66% black and 34% white were not considered fatal to desegregation plans in *Milliken I* and Wright v. Council of the City of Emporia, 407 U. S. 451 (1972). A plan resulting in racial compositions 77% black and 22% white was implicitly approved in U. S. v. Scotland Neck Board of Education, 407 U. S. 484 (1972). *See Milliken I,* 418 U. S. at 717 n. 22.

vestiges of impermissible racial discrimination perpetuated in Delaware by *de jure* segregation of public schools.

In so doing, the Court draws on its powers in equity which have been well defined in desegregation cases such as *Brown II, supra; Swann, Milliken I, Milliken II, supra,* and *Hills v. Gautreaux,* 425 U. S. 284 (1976). Central to these cases is recognition that the task of righting discrimination necessarily entails considering not only what is fair but also what is practical. Specifically, the Supreme Court has advised that equity traditionally "has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown II,* 349 U. S. at 300 (footnote omitted). In this case, the Third Circuit has recognized that a judicial decree to effectuate desegregation must necessarily take "into account the practicalities of the situation" lest a court order into effect a plan falling fatally short of its desired goal. 555 F. 2d at 379 (quoting *Davis v. Board of School Commissioners,* 402 U. S. 33, 37 (1971)). For example, although a dual school system would cease to exist if all public schools in Northern New Castle County were closed, such an alternative could hardly be termed a reasonable attempt to meet constitutional standards. *See Griffin v. County School Board of Prince Edward Co.,* 377 U. S. 218 (1964). Similarly, a 12-0 configuration, assigning all students from the predominantly black districts to schools in the predominantly white districts, would result in a conversion to a non-discriminatory unitary school system but, absent special circumstances not present here, one could not successfully contend such a proposal should be upheld by a court sitting in equity. *See Evans v. Buchanan,* 435 F. Supp. 832 (D. Del. 1977). It follows that the means employed to accomplish desegregation must necessarily be considered against the practicalities and equities of the situation in order to insure that a desegregation scheme is just in application and possesses a reasonable probability of success.

Because this is not a case requiring a court to devise its own plan due to a total abdication by local authorities, the Court in no way presumes to dictate the type of education that must occur in Northern New Castle County. Despite its long, tortuous history and the failure of the Legislature to respond, the case at this stage is not characterized by recalcitrance and obdurance. Several reassignment concepts have been submitted to the Court, demonstrating a high level of responsibility by the NCCPBE, the Pupil Assignment Committee, and Delaware educators. Matters of educational programming and quality of education are properly the province of educators, not that of the Court. Testimony in this case demonstrates that Delaware educators are highly qualified to make such determinations and the Court does not purport to substitute its judgment for theirs. Accordingly, the Court narrowly visualizes its duty as one of ordering into effect a scheme for desegregation that meets the constitutional goal in a practical and equitable manner.

Not all agree; all parties to this action with the exception of plaintiffs and intervening defendant DeLaWarr District perceive no need for the Court to issue any order on pupil assignment. Relying on current legislation permitting voluntary transfers for 1977-78,* defendant State

* Voluntary transfers were theoretically possible for a long time in Delaware. But because permission was required by both the sending and admitting schools, actual transfers were rather infrequent. Voluntary plans predicated on then-existing legislation were documented and rejected by the three-judge court. 416 F. Supp. at 344-46. In response to the June 15, 1976 order from the three-judge court on remedy, the Legislature provided that in the 1976-77 school year any student could transfer to any district that would accept him. Subsequently, two predominantly white districts re-

Board and defendants from the nine predominantly white districts maintain that the opportunity afforded a student to transfer to a school in which his race is a minority is adequate to overcome the dual school system and the pervasive effects of *de jure* segregation. Not only is the evidence to the contrary,* but the voluntary transfer legislation suffers from the basic flaws that proved fatal to the State Board's alternate proposal known as "reverse volunteerism". The latter provided for the mandatory assignment of black students to predominantly white district schools but permitted any student subsequently to opt out. Depending on a number of variables, not the least of which was the receptivity of the predominantly white districts in welcoming black students, the number of blacks who could be expected to accept their assignments and thereafter continue in those schools was indeterminate. Absent any evidence that the plan would work and given the more than 20 years that the State has had to dismantle its dual system, this Court concluded that the plan's disparate burden and "too little, too late" character rendered it unacceptable

* (Cont'd.)
fused to accept any transferees, white or black; another accepted only black students; and the Wilmington School District impeded transfer of its white students by refusing to forward their records. Modified legislation required all districts in 1977-78 to accept the application of any student whose race is underrepresented in the transferee school so that black students from Wilmington and DeLaWarr may transfer to the predominantly white districts and white students from the predominantly white districts may transfer into Wilmington and DeLaWarr. P. D. I. Exh. 5B, at 11. As the law was directed to 1977-78 only, one cannot presage what the Legislature would have done for the school year 1978-79 and thereafter.

* As of August 1977, only three white students had elected to participate in the voluntary transfer plan. 435 F. Supp. at 837 n. 14. No evidence suggests that there has been a significant increase in that number. In contrast, some 2,000 black students transferred out of Wilmington and DeLaWarr. NCCPBE Exh. 9; Doc. 663A, at 176 (Kirk).

under *Green v. County School Board*, 391 U. S. 430, 438-9 (1968). 435 F. Supp. 832, 841 (1977). The voluntary transfer plan promises even less. Requiring affirmative independent action by a large number of individuals, it does not describe a plan that "promises realistically to work *now*," *Green, supra*, 391 U. S. at 439, and consequently at this late date cannot be the basis of a desegregation order for Northern New Castle County.

The Court recognizes that *Green* does not *per se* invalidate all voluntary plans but rather requires review of their effectiveness. The voluntary transfer plan which has attracted so few white students into the predominantly black districts fails to meet the constitutional objective. Although it is black students represented by the Wilmington School District who have sought relief from the affirmed constitutional violation, it does not follow that they, the aggrieved party, should assume full responsibility for rectifying the wrongs directed at them. Ordinary fair play would appear to dictate the opposite result or, at the least, an attempt to minimize the impact visited on those who have been wronged. In this regard, the Court is not totally insensitive to the dismay and anger experienced by some white citizens who must assume responsibility for violations arising out of discriminatory laws enacted in the past over which they exercised little or no control. However sincere and strongly held, such beliefs fail to recognize that widespread discrimination, sanctioned by law, was practiced in Delaware in contravention of the United States Constitution and that today the effects of that condition persist in the form of separate but equal school systems in the desegregation area in violation of *Brown I, supra.*

The State Legislature, although allotted an unprecedented amount of time, has defaulted, not even enacting

enabling legislation to permit defendant State Board to address this constitutionally impermissible condition. In addition, defendant State Board fairly can be characterized as channeling its energies toward preservation of its legal position, rather than attempting to redress the constitutional violation. In view of this default, the Court's duty is to implement a remedy, the parameters of which have been established by the three-judge court's primary remedial decree. To accomplish this end, a proper, though not sole, consideration is an awareness of the desirability of minimizing the disproportionate burden on any racial group in choosing a concept that effectively desegregates within the established parameters. Curing the constitutional infirmity requires assignment of students for some period of time to schools which they otherwise would not have attended. Obviously transportation to these schools is necessary. But children in Northern New Castle County are presently transported to school by bus to a large degree.* Nonetheless, implementation of a desegregation plan within the fixed parameters of the primary remedial decree represents change and thus must be approached with great care and always in a fair and practical manner.

With these considerations in mind, the Court must evaluate the merits of the 10-2, Plan W, and 9-3 concepts. Analyzing first the NCCPBE majority 10-2 plan, the Court finds the concept presently undesirable as a remedy to cure the constitutional infirmity in this case because of a number of perceived weaknesses. Specific examples are the basing of a decision adverse to black students on a grade fraction favorable to black students, reassigning only black children in the tender elementary years, and failing to use any of the black high schools as 10-12 grade centers.

* *See* n. * *infra*, p. A159.

The probable result would be a disproportionate number of black schools targeted for closing, causing concomitant adverse effects and impeding the plan's chance for success.

The concept of 10-2 was generated by multiplying the 21.7% figure for black students in the affected area by twelve grades to determine that 2.6 was the number of grades requiring white reassignment in order to produce a "complete mix".* Having arrived at a number closer to three than two grades, the New Board arbitrarily chose to assign children from predominantly white districts the lesser number of two years, thereby requiring the reassignment of children from predominantly black districts for ten years rather than nine.**

In anticipation of assigning children from predominantly white districts to schools in the predominantly black districts for two years, the NCCPBE proceeded to establish two year grade centers in Wilmington and DeLaWarr while retaining almost a full range of grades in the formerly white districts.*** Some children from the predominantly white districts would be educated in Wilmington for grades 5 and 6; some for grades 6 and 7; others would come into the city for 7th and 8th grades; still others for 8th and 9th grades. In DeLaWarr, children from the predominantly white districts would be assigned only to grades 8 and 9.

* Of necessity, the NCCPBE utilized projected enrollments. Actual enrollments as of September 30, 1977 indicate that 22.3% of students in the affected area are black, D. P. I. Exh. 4, yielding the number 2.676.

** Testimony fails to provide justification for this decision. *See* Doc. 663A, at 154-56; Doc. 663E, at 104-05 (Kirk).

*** Although no one attendance area offers a full range of grades, all grades are offered somewhere throughout the predominantly white districts. For example, when children from the predominantly white districts in Area I attend grades 6-7 in the predominantly black districts, the predominantly white districts in Area I do not offer these grades, but they are provided in the predominantly white district in Area III.

The decision not to use any of the black high schools as high schools under the 10-2 concept is conceivably explained by reference to the principle that all children in the desegregation area are to be treated equally and by acceptance as educationally desirable that a student should attend a given high school for at least three years. But this reasoning surrenders much of its attraction when used as an underpinning to support a decision not to use any of the three black high schools as high schools. The decision becomes more questionable when one notes that Wilmington High School is in excellent physical condition, is one of the few schools in the desegregation area to boast a swimming pool, and is close to a municipal golf course. Finally, the choice becomes particularly dubious when one realizes that Wilmington High School is strategically located for desegregation purposes on a district line in a corner of the Wilmington District. As a result, if Wilmington High School were simply moved across a relatively narrow road in a westerly direction (a distance of no more than sixty feet), it would be in the predominantly white Alexis I. District; or, if moved one block in a southerly direction, Wilmington High School would be in the predominantly white Conrad District.

Additional considerations further imperil the 10-2 concept. Credible testimony to the effect that the primary and high school grades are perceived as the most important grades indicates that the less important grades were assigned to the predominantly black districts.* Concern was intimated over the prospect of children from the predominantly white districts travelling to school by bus in

* *E.g.*, Doc. 596B, at 490 (Transcript of Hearings of 7/17/77-7/25/77) (Minter): "[W]e consider the primary grades, one through three, as most important, I think, in determining what a youngster is going to do or be able to do in acquiring basic skills." *See id.* 489-92.

the primary grades; the worry was obviated by the expedient of assigning all children from the predominantly black districts to travel to the predominantly white districts during those years. No mention was made that the parents of those children from the predominantly black districts might be equally concerned about their children's transportation in the early years. Also, failure to reassign any child in the predominantly white districts for grades 1-4 or for the high school years necessarily reduces the number of grades which the former black schools can offer. Moreover, plaintiffs point out that with a surplus capacity in the county as a whole, severe underutilization of the city schools will inevitably target them for closing.** Arguably, these anticipated school closings, the conversion of the Wilmington high schools to grade centers, and the attendant demise of the Wilmington high schools as high schools will both identify the formerly black schools and create widespread misapprehension that something was wrong with the formerly black schools in the first place.* Plaintiffs maintain the negative impact of such misconceptions upon both black students generally and white students assigned to these schools will have a deleterious effect upon the entire effort to desegregate.

Serious additional equitable questions are also raised by the 10-2 plan. First, given that most black children need be assigned nine or ten years out of their neighbor-

** Under the 10-2 plan Wilmington schools that are used are employed only to about 30% of capacity.

* Plaintiffs suggest that conversion of Wilmington High School and P. S. duPont High School into middle grade centers without consideration of the excellent physical facilities of these schools manifests a similar insensitivity or bias on the part of the NCCPBE. In this regard, one member of the New Board testified that the decision not to use either of these high schools as high schools had nothing to do with their educational quality or physical structure. Doc. 6630, at 115-16 (Scarborough).

hood schools and most white children only two or three years, the New Board, without detailing its reasons, chose to maximize that disproportionate burden on black students by assigning them ten years. The Court is fully cognizant that the law does not demand absolute parity among groups. Nonetheless, approval of plans resulting in disproportionate impact generally rests upon ample justification. For example, in *Allen v. Asheville, supra,* the court approved a plan primarily in which black students were transported during grades 1-5 because white students bore the burden during grades 6-12 and alteration of this arrangement would have increased the transportation expense unnecessarily without corresponding benefit to either group. *See Norwalk Core v. Norwalk Board of Education,* 423 F. 2d 121, 124 (2d Cir. 1970); *Hart v. County School Board of Arlington Co., Va.,* 329 F. Supp. 953 (E. D. Va. 1971). Other courts have viewed peculiar circumstances to justify school closings in black neighborhoods. *See, e.g., Mims v. Duval County School Board,* 329 F. Supp. 123 (M. D. Fla.), *aff'd,* 447 F. 2d 1330 (5th Cir. 1971). Obviously a student does not have a right to attend the school building of his or her choice and should a formerly black junior high school be converted to a magnet school for the gifted, *Hart v. Community School Board of Education,* 393 F. Supp. 769, 772 (E. D. N. Y. 1974), *aff'd,* 512 F. 2d 37, 53-54 (2d Cir. 1975), or a certain school closed because it is physically unsound and located in a dangerous and noxious neighborhood, no one can be heard to complain. *See Mims, supra.*

The plenary power of a school board to utilize or close a given school building as it should see fit is not challenged here. What is open to question is whether a plan to provide a unitary racially non-discriminatory school system can, without reciting any underlying justification, transport black children a greater number of years than is necessary

to accomplish the goal and simultaneously eliminate most grades in predominantly black districts when a practical alternative appears to exist. The answer arising out of principles of equity is no. At the very least, fundamental fairness demands that decisions that have the effect of maximizing the burden on black students be supported by justifications of a non-racial nature.* The instant record is devoid of any supportable explanation why a 10-2 plan was preferred to a 9-3 scheme or why a 9-3 arrangement was not seriously considered in the first instance.

Accordingly, the Court at this time must withhold approval of the 10-2 plan.

The Court also questions the validity of Plan W. Although it too would effectuate a transition to a unitary racially nondiscriminatory school system and therefore meets the constitutional objective, Plan W holds scant promise of satisfactory implementation. Advanced as a minority report of the NCCPBE, Plan W has attracted the support of neither the New Board, defendant State Board, or defendant predominantly white districts, all of which generally consider it the least attractive alternative. Starting from a premise that the capacity of the Wilmington schools must be utilized to the fullest in order to minimize the disproportionate impact on black students, Plan W reassigns children from the predominantly black districts to the predominantly white districts for an average of eight years and reassigns some but not all of the children out of the predominantly white districts for up to seven years. These reassignments are intended to enable accommodation of four full grades of children in the city, thus minimizing the number of years black children must

* Fear that whites would not attend or prefer not to attend a formerly black school is an example of an inadequate reason. Lee v. Macon County. 448 F. 2d 746, 753-54 (5th Cir. 1971).

be reassigned to an average of eight years.* Besides minimizing the disproportionate impact on black students with respect to the number of years assigned, Plan W also provides a full range of grades in Wilmington, thus reducing the potential for immediate racial identification of the formerly black schools.

The NCCPBE majority believes the major weakness of Plan W to be that instead of the entire student community, only certain geographic areas actively participate and then for a varying number of years. It is claimed that a plan which fails to reassign children from certain predominantly white districts and reassigns children from other predominantly white districts for as many as seven years ** will promote bitterness and confusion. Arguably, rather than a likelihood of success, such a plan creates the distinct possibility of resegregation by permitting easy methods by which to withdraw one's participation.

An additional criticism of Plan W is that its complex pairing and clustering arrangement fails to keep students together during the course of their educations to the same degree possible under the majority plan. Groups are splintered at the elementary level * and feeder patterns are broken due to the attempt to provide a high school education in Wilmington for any Wilmington child who had been assigned outside that district for nine years.

The plan's method of provision for high school education in Wilmington is also problematic. Anticipated use of the present Wilmington and P. S. duPont High Schools is predicated on a concept of regionalization which does not appear feasible. Drawing a two mile zone around each high school, Plan W's adherents hypothesize that the area would encompass sufficient numbers of white and black

* The record fails to establish this would actually occur.

** PX 19.

* PX 15; NCCPBE Exh. 20.

students who would be within walking distance of the school. Superficially attractive, this attempt to regionalize breaks down when evidence is credited that safety hazards along the two mile route prohibit walk-ins to any significant extent.** Furthermore, the two mile circles come within one-half mile of other high schools so that students within actual walking distance of much closer high schools would be assigned to high school in Wilmington.

The foregoing enumerated weaknesses and serious reservations regarding the feasibility of Plan W indicate it should not be afforded further consideration.

Finally, the Court also has before it the Pupil Assignment Committee's feasibility study which indicates that a 9-3 concept incorporating total student involvement and retention of feeder patterns is possible. Treating all children in the desegregation area equally, the report demonstrates the use of three year consecutive grade reassignments for students living in predominantly white districts, and nine year reassignments for students in the predominantly black districts. In addition to minimizing the disproportionate impact on the aggrieved class, a 9-3 concept provides ready opportunity to offer high school grades 10-12 in Wilmington and/or DeLaWarr, utilizing the available high school facilities in those locations to the extent such use is educationally desirable.

Among the several illustrations generated by the Pupil Assignment Committee, the "G" configuration appears superior. The G illustration retains a tight feeder pattern and provides a full grade span in the predominantly black Wilmington district, thus including use of at least one of the Wilmington high schools as a high school. Under the G illustration, when the Wilmington children are assigned back to the city for three years, they necessarily attend a

** Doc. 663M, at 103-05 (Ellis); Doc. 666.

school close to their homes. This feature, apparently afforded children from predominantly white districts under the 10-2 plan, simply ought to be preserved as much as possible. The use of geocodes also permits the possible high school use of both Wilmington high schools should the NCCPBE decide such use to be educationally satisfactory. Further, the increased flexibility under G permits easy modification in the future should adjustments be necessary or desirable. Where the educational patterns of thousands of children are involved, a flexible approach is advantageous; G appears to be such a plan.

Apart from the question of capacity, neither the New Board nor defendants State Board and intervening districts have advanced any reasons why a 9-3 concept ought not to be successfully implemented in the desegregation area. Nor has it been shown that if a capacity problem of minor dimension exists, a slight departure from 9-3 is sufficiently deleterious to justify a wholesale embracing of 10-2. Thus the issue before the Court is whether the evidence demonstrates sufficient capacity in Wilmington and DeLaWarr to render feasible a 9-3 plan.

It is important to realize at the outset that unlike the affected areas in other reported desegregation cases, Northern New Castle County contains no dearth of school spaces. To the contrary, declining enrollments have resulted in a surplus of seats in all districts such that absent any desegregation order the need to consider closing some schools is abundantly evident.* Under the 10-2 assignment plan, severe underutilization of city schools identified the Wilmington schools as ready targets for closing. Under a 9-3 assignment plan, most if not all of the Wilmington and DeLaWarr schools are actively utilized and

* A further enrollment decline of over 15% is projected for the next five years. Ct. Exh. 109, at 3.

would probably remain open. In contract to the devastating impact of the 10-2 plan on the degree of utilization of schools in the predominantly black districts, however, the 9-3 concept contemplates only minor adjustments in the use of the schools in the predominantly white districts, reducing their utilization from a current figure of 70% to 67%.*

Against this background, some have argued that any plan ought to proceed by closing schools first and assigning students to the remaining open schools. Because the paramount goal sought is the vindication of children's rights, the Court's focus is primarily on the effective and equitable assignment of students. Whatever school buildings, if any, ultimately close as a consequence of a particular assignment plan is a matter of secondary importance and one within the purview of the NCCPBE.** Despite an express invitation for presentation of applicable testimony, the record does not reveal that one or more schools currently in use cannot or should not continue to be used for any reason. Therefore, the Court must assume that the entire school building capacity of the affected area is available for assignment.

The measurement of actual capacity of school spaces is a matter of considerable disagreement. The Department of Public Instruction has supplied figures of state-rated capacity. These figures were arrived at by multiplying the number of rooms in a school building employed for regular classroom use by thirty children and the number of other rooms by fifteen children. The State then adjusted

* PX 26.

** Should the New Board decide to close some schools, it is understood that in the interests of effective administration the NCCPBE would announce specific pupil assignments only after it had determined which schools would remain open, so that parents and children would not face unnecessary confusion.

the total number downward by 10% in secondary schools and 5% in elementary schools. The resulting figure is the state-rated capacity.

Pointing out that this figure fails to account for special education classes, defendants and the NCCPBE contend that the state-rated figures are an inaccurate means of projecting actual capacity. Also, some administrators have testified that adherence to state-rated capacities fails to provide adequate flexibility for desirable programming. In this regard, the Court notes an obvious difference of opinion among administrators concerning what is optimal utilization of a school building.*

Plaintiffs also challenge the accuracy of the state-rated figures, contending that one must examine actual buildings, rather than employ a blanket formula. Maintaining that the State formula fails to include considerable usable space within a building such as libraries, gyms, and auditoriums, plaintiffs additionally note that band rooms and choral rooms capable of seating large numbers are counted as non-regular rooms with a capacity of 15 spaces. Relying on the current practice of placing special students in a regular classroom in a method known as "mainstreaming", plaintiffs contend that defendants' proposed adjustments of state-rated capacities for special education students are wildly exaggerated.* Finally, plaintiffs assert

* Dr. Johnson considers 90% of actual capacity to be optimum utilization. Doc. 663H, at 190. He noted that state-rated capacity is presently calculated at 90% of actual. *Id.* 192. Dr. Johnson's testimony was not controverted until the feasibility of 9-3 became increasingly clear. Then Dr. Byrd testified that 80% utilization was the desirable maximum during the initial stages of desegregation. Doc. 695T, at 41. Dr. Pugh testified that in the Alexis I. District a 10% downward adjustment of the State formula at the elementary level and a similar 5% adjustment at the high school level provided more accurate data than that obtained by the State method. Doc. 695T, at 59, 62.

* Special education classes may consist of eight, ten or fifteen pupils depending on whether the class is one for Learning Disorders (LD), Socially, Emotionally Maladjusted (SEM), or Educably Mentally Retarded (EMR). No satisfactory estimate of the impact of these classes on overall capacity is available, given that the State utilized the Learning Disability figure of 8 for all its calculations. *See* D. P. I. Exh. 8, at 3-4.

that defendants' reliance on alleged capacity problems to defeat a 9-3 plan is highly suspect given that under the 10-2 plan, certain predominantly white districts exceed state-rated capacity. Plaintiffs correctly note this excess utilization provoked no complaints ** and many of the districts purported to have provided in the past sound educational experiences in buildings theoretically utilized in excess of capacity.

There is little to suggest that placing three grades in Wilmington and DeLaWarr would result in overutilization of those schools and a great deal to support the argument that three year grade centers are practical. The potential assignments and the resultant utilization figures supplied by the Pupil Assignment Committee in the 9-3 report were devised under severe time constraints. Further, the illustrations do not purport to definitively analyze potential overcrowding problems or suggest that other illustrations resulting in little or no overcrowding could not be delineated. In addition, because of the perceived desirability of retaining the precise attendance areas of the 10-2 proposal, the geographic areas of Wilmington and DeLaWarr are treated as entirely separate entities such that Wilmington serves Areas I, II, and III exclusively and DeLaWarr receives

** Under the 10-2 plan, seven of the thirteen elementary schools in Attendance Area III exceed 95% of state-rated capacity and five of these schools are projected at 100% or more of state-rated capacity. NCCPBE Exh. 1, at A 31-32. A few isolated schools in the other attendance areas are potentially overcrowded as well. D. P. I. Exh. 9b. In contrast, under the 9-3 G concept, only seven schools exceed 95% of state-rated capacity, with only one primary school (Harlan) exceeding 100% of state-rated capacity. Ct. Exh. 103 (Calculations include adjustments based upon notes within this exhibit.)

students exclusively from Area IV. Consequently, none of the illustrations attempt to demonstrate what fit is possible if the substantial excess pupil spaces in DeLaWarr are utilized to obviate any resultant capacity problems.

The sample 9-3 assignments result in between eleven and nineteen schools used in excess of 90% of their state-rated capacity.* Of these schools, three or four are high schools. Capacity problems at the high school level are generally considered to be far less significant than a similar degree of congestion at the lower levels.* At the elementary school level calculations of even the rough figures indicate that, throughout Wilmington, schools housing grades 1-6 would be utilized at between 83.9% and 88.6% capacity and the middle schools serving grades 7-9 at between 89.1% and 98.5%.** Any perception of overcrowding is further relieved by the identification of between 1551 and 2207 empty seats in the Wilmington schools, with some 1039-1487 at the elementary level and between 290 and 1003 reserve capacity in grades 7-9.***

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* Ct. Exh. 101A, 101C. Concept G results in the fewest crowded schools.

* The consensus of opinion is that at the high school level, vocational technical schools, dropouts, and programming, ameliorate overcrowding. *See, e.g.*, Doc. 695R, at 146-47 (Carey).

** Calculations based on Ct. Exh. 101A, App.; 101B reflect:

Grades		*Enrollment*	*Capacity*	*% Utilization*
K-6	S_1	9349	10697	87.39
	S_2	9084	10609	85.62
	S_3	7979	9509	83.90
	G	11312	12768	88.59
7-9	S_1	4818	5034	95.70
	S_2	4878	4950	98.54
	S_3	5545	6222	89.11
7-12	G	1443	1538	93.82

See PX 26.

*** Ct. Exh. 104. Under the G Concept, 2042 Wilmington seats are empty.

Thus adjustments of the isolated instances of overcrowding are clearly possible. Indeed the Pupil Assignment Committee anticipates major revisions in placing an actual plan into practice and has suggested that adjusting attendance area lines and geocodes, altering feeder patterns, and making lateral transfers are among the devices that might be used to relieve congestion.*

Possibly the best and most direct method of reducing any overcrowding in Wilmington would be to reassign to DeLaWarr some of the children presently assigned to Wilmington. DeLaWarr's five schools have more than adequate capacity to house the three grades presently assigned it under the 9-3 concepts. Under the three options proposed for Attendance Area IV, the schools in DeLaWarr are utilized only to 58.4-73.5% capacity.** Thus in presenting the three options for Attendance Area IV under the 9-3 feasibility study, the Pupil Assignment Committee expressed concern about overcrowding not in DeLaWarr but in the predominantly white sector. Applying the same standard of overcrowding, however, the schools in Area IV identified as overutilized in 9-3 are also potentially crowded under the 10-2 formulation.* No litigant, however, objected to the overcrowding in New Castle-Gunning Bedford precipitated by a 10-2 plan. One can only conclude that capacity problems either do not exist or can be corrected.

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* *E.g.*, Ct. Exh. 101A, at 10-11.

**	*Enrollment*	*Capacity*	*% Utilization*
Option 1	2524	4264	59.19
Option 2	2491	4264	58.41
Option 3	3134	4264	73.49

See Ct. Exh. 101A, App.; 101B.

* Under the 10-2 plan, the William Penn High School is utilized at 99.74%, George Read Middle School at 88.27%, New Castle Middle at 96.01%, and Gunning Bedford Middle at 88%. NCCPBE Exh. 1, at A 43, 47.

In any event, it is obvious that to the extent Wilmington is overutilized and DeLaWarr is underutilized, one may adjust for the other. Plaintiffs point out that adding 920 children to the number presently assigned to DeLaWarr under Option 1 would increase DeLaWarr's capacity to merely 80%.** Cognizant that the difficult task of pupil assignment involves more than mechanically assigning seats to pupils, the Court declines to suggest or endorse the addition of any particular number. Decisions of this sort are best left to the authorities charged with operating the schools.

Given the clear superiority of the 9-3 concept and all indications that the alleged problem of capacity is capable of resolution, it is concluded that 9-3 is a concept that promises to meet the constitutional goal of effectuating a unitary racially non-discriminatory school system in an effective and equitable manner. The Court will order implementation of a 9-3 plan which utilizes a full grade span in Wilmington. This requirement carries with it the necessity of utilization of at least one of the Wilmington high schools as a 10-12 grade center at a capacity comparable to those of high schools in the predominantly white districts. In implementing a 9-3 pupil assignment concept and managing school affairs, the NCCPBE retains the flexibility to alter attendance area boundaries, modify elementary attendance zone lines, adjust geocodes, employ lateral transfers, break feeder patterns if required, and utilize any other reasonable desegregation tool to achieve what is in its opinion the optimal 9-3 configuration. Although no specific concept is mandated by the Court, it is noted that the G illustration displays the greatest preliminary promise of maintaining feeder patterns while enabling

** Adding 920 to numbers set out at n. ** *supra*, p. A148 would actually render the percentage of utilization anywhere from 79.9-95%.

children in the predominantly black districts to attend schools close to their homes during the three years they remain within their districts. Because preservation of NCCPBE flexibility is regarded as of the utmost importance, the New Board's decisions with respect to pupil assignment will not be questioned so long as a 9-3 fit and the few parameters imposed above are met.

One cannot conclude with absolute certainty that the promise of 9-3 will materialize until the NCCPBE, presumably through its Pupil Assignment Committee, has the opportunity to review current enrollment figures, refine its techniques, and exhaust all methods of alleviating capacity problems. If at that time, a 9-3 concept utilizing a complete grade span including at least one high school in Wilmington is demonstrated to be unfeasible, the New Board may apply for relief from the pupil assignment component of the Order which will be entered on this Opinion. Relief will be granted upon a showing of good cause.

E. "But For" and The Inter-District Remedy

The court has reviewed and analyzed all proposals fully cognizant that the New Board (10-2) configuration, the minority report (Plan W), and the concepts proffered by the Pupil Assignment Committee pursuant to Court direction (9-3) were formulated without exacting consideration of whether they returned the Northern New Castle County schools to the precise position they would have assumed "but for" the found constitutional violations. Defendants allege that these proposals are therefore violative of *Dayton Board of Education v. Brinkman*, 97 S. Ct. 2766 (1977).*

* Doc. 669, 694 (Intervening Defendants); Doc. 670 (Defendant State Board of Education). On this and most other issues, defendant DeLaWarr District is not aligned with the majority of Intervening Defendants.

In the first place, defendants "but for" argument is a belated attempt to relitigate an issue already conclusively resolved in this case, with all right of appeal exhausted. Following two extensive hearings on violation and remedial plans, the three-judge court applied controlling legal standards to this case. In the first two opinions, the three-judge court found *inter alia* comprehensive *de jure* segregative actions with inter-district effects under *Milliken I, supra*. 379 F. Supp. at 1220, 1222-24; 393 F. Supp. at 432-38, 445, 447. These findings were summarily affirmed by the Supreme Court. 423 U. S. 963 (1975). In a third opinion, following evidentiary hearings on various plans submitted by the parties, the three-judge court clarified its duty in the context of prescribing an inter-district framework for the transition to racially nondiscriminatory education: "Our duty is to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred." 416 F. Supp. at 341 (footnote omitted). In satisfying its duty, the three-judge court relied primarily upon *Milliken I* and *Swann, supra*, and made the detailed findings of fact and reasoned statement of law later explicitly required by *Dayton*.

The Third Circuit modified this opinion not with respect to scope or extent of remedy but only to assure that no particular racial quota be imposed in eliminating the constitutional violations. 555 F. 2d 373 (3d Cir.), *cert. denied*, 46 U. S. L. W. 3220 (U. S. Oct. 4, 1977). Specifically, in affirming the three-judge court remedy order the majority of the Third Circuit en banc panel rejected the dissent's view that:

> "[A] remand to the district court is also required so that the district court can determine as precisely as possible what the racial composition of the schools of northern New Castle County would now be if those interdistrict violations found to be valid had not taken place. To put it another way, the district court should determine to what extent the present racial makeup of the affected schools is attributable to acts which violated the Equal Protection Clause and to what extent it is attributable to economic and social forces, to private actions, and to nondiscriminatory governmental actions. After the district court has made that determination, it could then require the parties to submit plans designed to remedy the effects of the constitutional violations."

555 F. 2d at 390 (dissenting opinion). Thus the "but for" issue asserted by defendants is controlled by the law of the case,* and all right of appeal on this issue has been exhausted.** The limited task remaining for this Court is to assure the implementation of an assignment pattern that complies with the remedy opinion issued by the three-judge court as modified by the Third Circuit.***

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* *See* Insurance Group Comm. v. Denver & Rio Grande W. R. R., 329 U. S. 607, 612 (1947); 1B *Moore's Federal Practice* ¶ 0.404 [1].

** This is not the first time during the course of this suit that defendants have sought to relitigate an issue in contravention of the law of the case principle. *See* 555 F. 2d at 378.

*** Concerning defendants' request for a further inquiry with respect to discriminatory intent and "incremental segregative effect", *see Dayton, supra*, 97 S. Ct. at 2775, this Court restates its prior holding that "the three-judge court made all the subsidiary findings . . . that the record permits without resort to sheer speculation." Also, defendant State Board of Education has asserted the "position that it is not 'feasible' to determine what the affected school districts and school populations would be today 'but for' the constitutional violations found by the three-judge court and affirmed on appeal." Doc. 548. The NCCPBE apparently has agreed that such an inquiry would not be feasible. *See, e.g.*, Doc. 663C, at 3-11 (Kirk).

With regard to the claim that *Dayton* established a "new" concept, Doc. 694, at 2, it is specifically noted that the Supreme

An analogous attempt to relitigate a previously resolved issue transpired in the Boston school desegregation episode, *Morgan v. Kerrigan, supra.* The First Circuit squarely rejected the notion that at the remedial stage a court should decide anew issues definitively adjudicated in earlier phases of a case:

> "The Association, in effect, argues that the trial on liability should be treated as the first of two battles, and that the second battle should involve a more particularized inquiry into the causes of the segregation at the individual schools within the system. . . . This second battle would be considerably more complicated than the first. . . . The district court could be faced with the task of making percentage findings as to every school in the district.
>
> "The short answer to the Association is that its position is squarely contrary to the remedial principles of *Swann, Davis,* and *Green.*"

530 F. 2d at 416 (footnote omitted). In a similar vein, this Court concludes that the battle defendants seek to wage already has been fought; the time has arrived for all parties to seek to cure the constitutional infirmity rather than prolong the illness.

Second, the *Dayton* decision is factually distinct from the case at bar and therefore not dispositive. In *Dayton,* the district judge found three "relatively isolated", 97 S. Ct. at 2772, violations that could be deemed "of question-

••• (Cont'd.)

Court in *Dayton* did not purport to establish a novel constitutional standard. *See* 97 S. Ct. at 2776 (Brennan, J., concurring): "The Court today reaffirms the authority of the federal courts 'to grant appropriate relief of this sort [i.e., busing] when constitutional violations on the part of school officials are proven.'" Moreover, the concept of segregative intent was articulated at least as early as Keyes v. School Dist. No. 1, 413 U. S. 189, 208 (1973).

able validity". *Id.* Confronted with this limited record, the United States Court of Appeals for the Sixth Circuit twice reversed orders of the district judge designed to cure the perceived infirmities. The circuit court "engaged in no fact finding of its own based on evidence adduced before the District Court", *Id.* at 2773, but nonetheless "apparently" imposed a "systemwide remedy". *Id.* at 2774. Accordingly, the district court judge, after two reversals, was compelled to order a broad remedy "entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents." *Id.*

Thus not only is *Dayton* distinguishable from the instant case by virtue of the extent and scope of the violations that have been definitively determined in *Evans* as compared to *Dayton,*• but *Evans* contains no history of extensive and improper circuit court interference not based on the record evidence. That this latter aspect was the fulcrum for *Dayton* was explicitly articulated in the concurring opinion of Justice Brennan:

> "This case thus does not turn upon any doubt of power in the federal courts to remedy state-imposed segregation. Rather, as the Court points out, it turns upon the 'proper allocation of functions between the district courts and the courts of appeals within the federal judicial system.'"

97 S. Ct. at 2776 (concurring opinion).

• Brennan v. Armstrong, 97 S. Ct. 2907 (1977), and School Dist. of Omaha v. United States, 97 S. Ct. 2905 (1977), per curiam decisions rendered the same day as *Dayton,* comport with this conclusion. Both those cases were remanded to the district court for reconsideration in light of *Dayton* and Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977). The significant factual difference in Evans v. Buchanan is that a system-wide violation requiring an inter-district remedy has already been definitively determined.

Third, the firmly established constitutional violations in this case are the perpetuation of a dual school system and the vestige effects of pervasive *de jure* inter-district segregation. *Evans v. Buchanan*, 416 F. Supp. at 343; 393 F. Supp. at 432-38, 445, 447. *Dayton* reaffirms that "[o]nce a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" 97 S. Ct. at 2775; *see Milliken I*, 418 U. S. at 744; *Swann*, 402 U. S. at 16. Eradication of the constitutional violation to the scope and extent enumerated by the three-judge court is all that any of the plans and concepts submitted purport to accomplish,* and that is all the concept endorsed by the Court does accomplish.

This is not a case of the lower court failing to perform its fact-finding task, the circuit court arbitrarily substituting its judgment for the lower court, or the judicial process running astray. The ineluctable conclusion is that the time has passed for the argument defendants urge upon the Court. Defendants may find the law of the case distressing, but they cannot obviate its finality.

F. Congressional Enactment

Statutory priorities for assignment and transportation of public school students are codified in the Equal Educational Opportunities and Transportation of Students Act of 1974, 20 U. S. C. §§ 1701 *et seq.*** As a starting point, the three-judge court fashioned all the findings concerning the need for widespread alteration of district lines that are required by sections 1715 and 1756 of the Act. 416 F. Supp. at 361-64.

Realizing the existence of an inter-district constitutional violation has been definitively resolved in this case, the Court finds that an adequate remedy necessitates some mandatory transportation of students. 20 U. S. C. § 1755; *see Morgan v. Kerrigan, supra*, 401 F. Supp. at 263-64; 530 F. 2d at 412-15. The Court finds that the specific priorities enumerated in section 1713 are inadequate to achieve substantial desegregation in the schools of Northern New Castle County. Subsections (a) and (b) of section 1713 require assignment of students, considering only school capacity, natural barriers or both, to the schools nearest their residences that provide appropriate grade levels and types of education. Application of these provisions is not feasible because of geography and racial distribution within the affected area.* Priority (c), permitting majority to minority transfers, was considered and rejected as an alternative by the three-judge court. 416 F. Supp. at 344-46. Additionally, a variant transfer policy, dubbed "reverse volunteerism" by its proponents, was evaluated and rejected by this Court.** Priority (d), utilization of at-

* The Pupil Assignment Committee 9-3 concepts were designed pursuant to Court request, as alternate means of curing the condition offensive to the Constitution. The intent of the drafters of the New Board 10-2 Plan was signified by that document's title: "Report of the New Castle County Planning Board of Education Upon Its Plan For Operation of a Unitary School System." NCCPBE Exh. 1. The intent of the minority Plan W report was displayed in a letter by its principal sponsor that was inserted within the report. "In my opinion, this plan meets the Order of the Court and remedies the inter-district violation of unconstitutional segregation of New Castle County Schools." PX 15, Prefatory Letter at 1.

** Act of August 21, 1974, 88 Stat. 514, 20 U. S. C. §§ 1701 *et seq.*

* The determination of an inter-district violation effectively foreclosed these alternatives. The black student population of the area is heavily clustered within the Wilmington and DeLaWarr Districts. *See* D. P. I. Exh. 4. Given this distribution and the extent of the affected desegregation area, substantial adherence to the priorities of section 1713(a), (b) could not be accomplished within the context of an effective desegregation decree.

** 435 F. Supp. at 838-41. The proposal was rejected for "procedural, equitable, and substantive reasons". *Id.* at 841. With

tendance zones and/or grade structures to limit transportation except to the nearest school is, to the extremely limited extent feasible, a planning device appropriate to the pupil assignment concept endorsed by the Court.*** Priority (e), construction of new schools and/or closing of "inferior" schools, is not a practical method of reducing transportation and is therefore rejected as a potential means to accomplish desegregation in Northern New Castle County. First, because the affected area has a surplus of schools, scant, and probably no, new construction is foreseeable. Second, although the meaning of the term "inferior" * schools is nebulous, application of the criteria in this instance might result in the closing of schools in the predominantly black core area. Such closings would compel mandatory transportation of black students to an extent even beyond that presently contemplated, and would potentially impede the already limited applicability of the preferred priority (d). Priority (f), use of magnet schools, was considered and rejected by the three-judge court. 416 F. Supp. at 345-46.

** (Cont'd.)
regard to substance, the Court expressed its considerable doubt that the proposal would accomplish desegregation at any time, but particularly that it could desegregate *now*. *See* Green v. County School Board, *supra*, 391 U. S. at 439.

*** The geography and racial composition of the affected area, however, with a central predominantly black core and a dispersed suburban predominantly white population, vitiate widespread application of this priority.

* The district court in Morgan v. Kerrigan, *supra*, apparently defined "inferior" as "old". 401 F. Supp. at 264. Applying this definition, the majority of the "inferior" schools in the affected area are in the predominantly black Wilmington District. *See* D. P. I. Exh. 10. Despite the Court expressly inviting the parties to present such testimony, however, the record does not indicate that any schools in the Wilmington District are unsuitable for effective use in public education. *See, e.g.*, Doc. 663S at 150, 204-05 (Ellis); Doc. 663T at 105 (Dineen).

Because Congress explicitly stated that it did not intend to circumscribe the powers of the courts to enforce the fifth and fourteenth amendments,** the priorities of section 1713 are not conclusive. Accordingly, the Court finds that some transportation of students to schools other than those next closest to their residences is required to eliminate the dual school system and the vestige effects of *de jure* segregation in Northern New Castle County. *See* 20 U. S. C. §§ 1714(a), 1718. No showing has been made that required transportation poses a risk to the health of students or significantly impinges on the educational process of students.* *See* 20 U. S. C. § 1714(b); *compare Morgan v. Kerrigan*, 401 F. Supp. at 264.

G. Additional Pupil Assignment Matters

1. *Rising Seniors*

The term "rising seniors" has been employed in this case to refer to those students who will be high school seniors in the year in which the desegregation plan goes into effect. The three-judge court ruled that "rising seniors will not be required to be reassigned". 416 F. Supp. at 360. In recent hearings, substantial sentiment was expressed that rising seniors should be included within

** 20 U. S. C. § 1702(b); *see* Morgan v. Kerrigan, 530 F. 2d at 412-13; Evans v. Buchanan, 416 F. Supp. at 362.

* Although the extent of mandatory transportation that will be required is indeterminate, the Court notes that a previous submission in this case revealed that about half of the students in the affected area are bussed to school each day. Doc. 333, at 42. This percentage now is probably low; as a not atypical example, the superintendent of the largest of the eleven present districts testified during recent hearings that within his district approximately 11,000 out of 17,000 students are transported to school by bus. Doc. 663C, at 114 (Kirk). This high rate of bussing is a result of geography and State safety regulations. *See, e.g.*, Doc. 663M, at 101-02 (Ellis).

rather than exempted from any desegregation order.* The Court desires to afford maximum flexibility and discretion to local authorities and thus reaffirms that reassignment of rising seniors will not be mandated. Whether to include rising seniors in pupil reassignment is an educational determination properly made by the NCCPBE.

2. *Kindergarten*

The three-judge court also did not require the reassignment of kindergarten children. 416 F. Supp. at 360-61. The Court, noting that this is another issue properly within the province of the New Board, reaffirms the decision that reassignment of kindergarten students is not mandatory.

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* The NCCPBE has requested that it be afforded the power to include rising seniors within the eventual reassignment scheme. Doc. 672, at 9. The Chief Administrator and Executive Secretary of the New Board indicated that a plan "would be more convenient to put into operation if the rising senior [exemption] section were taken out," but that he doesn't "have any strong preferences" on the question. Doc. 663D, at 207-08 (Kirk).

Plaintiffs adopted the consistent position that they favored including rising seniors within any desegregation plan. Doc. 663D, at 242-44.

The State Board of Education initially espoused the position that the "rising senior exception is a bad idea generally", Doc. 663D, at 246, but that the State's position "may be" contingent on the plan favored by the Court. Doc. 663D, at 251; *see Id.* 244-51. At a later point, the State Board averred that rising seniors should be included within any of the proposed schemes. Doc. 695P, at 53.

The majority of intervening defendants waivered on the issue depending upon whether a particular plan or concept utilized the high school(s) within their districts as high school(s) or lower grade centers. So long as all high schools within a given district were employed as high schools, that district generally favored removal of any exemption previously afforded rising seniors. If a plan or concept entailed the potential for converting a high school within a district into a lower grade center, that district generally favored excluding rising seniors from desegregation. *See, e.g.*, Doc. 695T, at 184 (Alexis I); *id.* 192 (Claymont and Stanton); *id.* 193 (Conrad); Doc. 695P, at 55 (Marshallton-McKean); *id.* 61 (DeLaWarr).

3. *Special Schools*

A number of schools within the desegregation area serve the orthopedically handicapped, the audially handicapped, and students otherwise eligible for special programs. The three-judge court declined to change the location or manner of operation of these schools. 416 F. Supp. at 360. The Court adheres to the three-judge court determination that these schools need not be included within the desegregation decree and vests control over them in the New Board.

4. *Vocational Technical Schools*

The operation and supervision of vocational technical schools within the affected area were regarded by the three-judge court as matters "left to the discretion of state authorities" "[a]bsent a showing that the present method offends constitutional guarantees". 416 F. Supp. at 361. The three-judge court specifically exempted the DelCastle Center from inclusion within the desegregation decree, 416 F. Supp. at 361, and the Court continues that exemption. With regard to the other vocational technical schools, the Howard Career Center and Hodgson Vo-Tech, the NCCPBE has requested a one year exemption of these schools from the desegregation order. The Court grants the requested exemption, believing it appropriate under the circumstances of this case.

5. *Voluntary Transfer Students*

As previously recited,* Delaware law required that in 1977-78 all districts accept students whose race was underrepresented at a particular school and who wished to transfer to that school and some students accepted this

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* *See* n. * *supra*, pp. A133-A134.

voluntary transfer opportunity.** The overwhelming sentiment of the parties to this litigation is that upon implementation of a desegregation scheme those voluntary transfer students be treated as are all other students and not afforded an exemption to continue their educations at the schools at which they voluntarily transferred. Although sympathetic to the plight of the voluntary transfer students, the Court determines that for administrative reasons the transfer students must not be afforded an exemption. If at all feasible, assuring that the voluntary transfer students remain at their 1977-78 schools while at the same time implementing a desegregation scheme involving all other students would be an imposing administrative task for the NCCPBE. With this in mind, and noting that the relevant State law was expressly made operative only for the 1977-78 school year, the voluntary transfer students will not be exempted from the desegregation scheme implemented by the NCCPBE.

6. *Hispanic Students*

Treatment of Hispanic students is not discussed because agreement was achieved between the interested parties during the course of this litigation.*

II. ANCILLARY REMEDIAL RELIEF

The question whether federal courts can order remedial education programs as part of a school desegregation decree was answered affirmatively in *Milliken II, supra,* which provides that such remedial relief may be appropriate commensurate with guiding "equitable principles."

** *See* n. * *supra,* p. A134.

* NCCPBE Exh. 1A; *see* Doc. 649; Doc. 695M, at 54.

97 S. Ct. at 2757.* *See Brown II, supra.* The remedy must be related to the constitutionally offensive condition, designed "as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,'" ** and fashioned in accordance with the legitimate interests of state and local authorities in self-management. *Milliken II,* 97 S. Ct. at 2757.

The NCCPBE and plaintiffs have requested ancillary remedial relief by including such programs within their proposed orders.*** Additionally, intervening defendants have orally represented that such relief is appropriate for inclusion within a final order.* The State defendants disagree, presumably because in the absence of an ancillary relief order, the single district would be required to bear the entire cost of such remedial programs from local funds.

In objecting to imposition of ancillary remedial relief, the State Board contends that the New Board can implement such programs to the extent it believes necessary, but that a judicial order concerning ancillary relief is improper absent a showing that each aspect of the necessary remedial relief is presently "infected" with discriminatory bias.** That ancillary remedial relief is necessary and

* The Supreme Court noted that it had previously affirmed a lower court order that included a remedial relief requirement in the form of in-service training programs in *Swann, supra,* 97 S. Ct. at 2756-57 n. 13.

** The quoted portion is from *Milliken I, supra,* 418 U. S. at 746.

*** Doc. 696; 664.

Compare Milliken II, 97 S. Ct. at 2758: "[T]he Detroit School Board itself proposed incorporation of these programs in the first place."

* Doc. 695 U, at 64-81.

** Doc. 670, at 5. The State Board declares: "To the extent that the New Board believes the programs to be educationally desirable, it can implement them to the extent it feels they are necessary for whatever time it feels they are necessary without the constraint of a judicial mandate." *Id.* 6.

essential to accomplish the transition to unitary racially nondiscriminatory schooling and to overcome the vestige effects of *de jure* segregation in Northern New Castle County is amply supported and indeed undisputed on the record.•••

Stripped to its essentials, the argument of the State Board of Education is that raised by the state defendants in *Milliken II* and rejected by the Supreme Court:

> "Invoking our holding in *Milliken I, supra,* petitioners claim that, since the constitutional violation found by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments. This contention misconceives the principle . . . and we reject their argument."

97 S. Ct. at 2758.

The Court further stated:

> "*Montgomery County* therefore stands firmly for the proposition that matters other than pupil assignment

••• *E.g.*, PX 6B, App. B, at 32: "[N]o desegregation plan can truly be effective without an education component and other ancillary relief necessary to assure a transition to nondiscriminatory schooling, to begin to overcome the effects of the segregation violation and to prevent resegregation and to bar like discrimination in the future." PX 6B was written under the supervision of Dr. Joseph E. Johnson, Superintendent of Schools, Wilmington District. Doc. 663 I, at 16. Dr. Johnson orally stated that PX 6B in its entirety represents what is "necessary" for an effective plan. *Id.*

Dr. George V. Kirk, Superintendent of Schools, Newark School District, and Chief Administrative and Executive Secretary, NCCPBE, indicated that the components in PX 6B "are the kind of items that I think the Board of Education which is going to deal with desegregation has to deal with . . . ." Doc. 663 C, at 202; *see id.* 231; Doc. 663 D, at 7.

Describing the importance of ancillary relief programs to the desegregation experience in Hillsborough County (Tampa), Florida, Dr. Raymond O. Shelton, Superintendent of Schools in Hillsborough County, stated: "Well, they saved our life, we said, as far as having staff and people to work with young people." Doc. 663 B, at 88.

> must on occasion be addressed by federal courts to eliminate the effects of prior segregation.
>
> . . .
>
> "In light of the mandate of *Brown I* and *Brown II*, federal courts have, over the years, often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems.
>
> . . .
>
> "Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures."

97 S. Ct. at 2758, 2759, 2761.•

Applying the standards of *Milliken II*, and after a thorough, independent review of the evidence, the Court determines that in this case the forms of ancillary remedial relief particularized below are necessary and essential to overcome the dual school system and the vestige effects of *de jure* segregation and to assure an effective transition to a racially nondiscriminatory unitary school system. In mandating this relief, the substantial authority of state and local officials in managing educational affairs is recognized by according ample latitude to the NCCPBE. The precise development and actual implementation of remedial relief is left to the discretion of educational authorities. On this record, however, the Court is compelled to delineate certain general guidelines for ancillary relief required to redress the continuing constitutional violation.

First, the Court finds that in-service training is essential. Administrators, faculty, and other staff require orien-

• The initial reference is to United States v. Montgomery County Board of Education, 395 U. S. 225 (1969).

tation and training for desegregation. *See, e.g.*, PX 6B, App. B, at 32; Doc. 596 C, at 725-28A (Foster); Doc. 663 C, at 203-04 (Kirk); Doc. 663 I, at 16 (Johnson). *Compare Milliken II*, 97 S. Ct. at 2755-56. Therefore, the New Board will be directed to formulate and implement a comprehensive in-service training program for teachers, administrators, and other staff.

Second, reading and communication skills merit particular attention. "[S]peech habits acquired in a segregated system do not banish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task." *Milliken II*, 97 S. Ct. at 2761. *See, e.g.*, PX 6B, App. B, at 32-33; Doc. 596 C, at 785-86 (Foster); Doc. 663 C. at 204-06 (Kirk); Doc. 663 I, at 16 (Johnson). In order to remedy the effects of past discrimination, the New Board will be directed to institute an affirmative reading and communication skills program which does not resegregate pupils.*

Third, curriculum offerings and programs must preserve respect for the racial and ethnic backgrounds of all students. To that end, instructional materials, texts, and other curriculum aids should be free of racial bias. Therefore, the NCCPBE shall provide curriculum offerings and programs which emphasize and reflect the cultural pluralism of the students, and all instructional materials, texts, and other curriculum aids shall be free of racial bias.* *See,*

* Plaintiffs have requested inclusion of a provision that any reading and communications skills program not "reassign or otherwise demote pupils, in order to remedy the effects of the past discrimination." Doc. 664, at 16. There has been no demonstration the New Board would not make all efforts to avoid stigmatization of the victims of the constitutional violation. Accordingly, plaintiffs' request is denied.

* Plaintiffs have requested the Court to order that: "All testing and other educational assessments and pupil educational classifications shall be free of racial or other cultural bias." Doc. 664, at 16-17. Although an analogous provision was upheld in *Milliken II*, 97 S. Ct. at 2755, 2760, and is undoubtedly within a court's power to order in appropriate circumstances, there is no reason to assume on the present record that the NCCPBE would knowingly introduce or permit an element of racial or cultural bias in pupil testing, educational assessment, or classification. Plaintiffs' request is denied.

e.g., PX 6B, App. B, at 33-34; Doc. 663 C, at 206; Doc. 663 E, at 89 (Kirk); Doc. 663 I, at 16 (Johnson).

Fourth, to ameliorate the racial pressures on students undergoing desegregation and to prevent resegregation under the guise of curriculum or program choices, the NCCPBE must institute an effective and nondiscriminatory counseling and guidance program. This counseling and guidance program must insure that students are counseled on a racially nondiscriminatory basis concerning programs available in the area of work opportunities and opportunities for a college education; and that students who choose vocational and other special public schools in the area do so on a nondiscriminatory basis. *See, e.g.*, PX 6B, App. B, at 34; Doc. 596 C, at 786 (Foster); Doc. 663 C, at 206-07 (Kirk); Doc. 663 I, at 16 (Johnson). *Compare Milliken II*, 97 S. Ct. at 2755-56.

Fifth, selection of school sites, construction of new buildings, expansion of existing facilities, and closing of school buildings obviously have an important bearing on the future status of desegregation in this area.* *See Swann, supra*, 402 U. S. at 20-21. The New Board must establish and enforce nondiscriminatory guidelines for new construction, review of building needs, and the appropriateness of each proposed building project or school clos-

* The Court has already ruled that formulation of a pupil assignment scheme must precede decisions on school closings. *See* text *supra* at A145.

ing.** *See, e.g.*, PX 6B, App. B, at 34; Doc. 663 C, at 207 (Kirk); Doc. 663 I, at 16 (Johnson).

Sixth, it is necessary for the New Board to provide an appropriate human relations program throughout the unitary school system in order to protect the individual dignity of students and teachers and to prevent racial myths and stereotypes from prevailing in schools undergoing desegregation. *See, e.g.*, PX 6B, App. B, at 38; Doc. 663 C, at 207-08 (Kirk); Doc. 663 B, at 21-25 (Shelton).

Seventh, at the point of desegregation, particular concern for non-arbitrary and nondiscriminatory discipline is essential. The NCCPBE shall be directed to develop a code of rights and responsibilities regarding such issues as student conduct and suspension and expulsion, and to insure administration of the code in an unbiased manner. The New Board shall assure procedural and substantive safeguards as required by existing law. *See, e.g.*, PX 6B, App. B, at 38-39; Doc. 663 C, at 208-09 (Kirk); Doc. 663 B, at 26-27 (Shelton).

Eighth, in this case, independent of student assignment, the additional record* made at hearings conducted after issuance of the primary remedial decree demonstrates that racial identity of schools can be perceived solely by reference to the racial composition of staff and existing staffs manifest substantial disparity in racial make-up. *See, e.g.*, PX 18; *compare Swann*, 402 U. S. at 18. The New Board must reassign faculty, administrative, and

** Plaintiffs have urged inclusion of language requiring the New Board to "seek to equalize school facilities, prevent resegregation in the desegregation area, and minimize the disproportionate reassignment burden born by black students." Doc. 664, at 17. Ordering such language is not warranted under the circumstances of this case. Plaintiffs' request thus is denied.

* The three-judge court previously noted: "We have no figures in the record to indicate whether there is a substantial disparity in racial makeup of existing staffs." 416 F. Supp. at 359.

other staff personnel in the course of eliminating the dual school system and the vestige effects of inter-district *de jure* segregation in order to insure that schools do not retain their former racial identity through racially identifiable faculty and staff assignments.* *See, e.g.*, PX 6B, App. B, at 39-41; Doc. 663 C, at 139, 154-61, 209-31 (Kirk); Doc. 663 H, at 208-16; Doc. 663 I, at 4-5 (Johnson).

Care has been taken to assure that all components of ancillary remedial relief that will be ordered are supported on the record as vital and essential to an effective desegregation plan. Conversely, where record support is deficient, the requests have been denied. Those measures granted are necessary to cure the constitutional infirmity and restore the victims of discrimination as nearly as possible to the position they would have assumed in the absence of a violation.

III. GOVERNANCE

The word "governance" was initially employed in this litigation to "define who will be charged with the operation of the [racially nondiscriminatory unitary school] system on a day to day basis." * Governance has now taken on a secondary meaning, namely, identifying and resolving problems inherent in the transition from eleven

* Plaintiffs have suggested inclusion of two additional provisions, one requiring review of past hiring and promotion policies of the existing districts and appropriate actions to overcome the continuing effects of any past discrimination, and the other prohibiting any decrease in the percentage of minority employees at any level of responsibility during the transition to a racially nondiscriminatory system. Doc. 664, at 18-19. The record does not warrant imposition of the additional requested relief. Plaintiffs' request is denied.

* Evans v. Buchanan, 416 F. Supp. at 357; *see Evans v. Buchanan*, 555 F. 2d at 380-81.

school districts to a single district. Some of these problems stem from the refusal of the State Legislature to provide either a governance scheme or a statutory framework appropriate for the operation of one district.** As a consequence, this statutory deficiency must be repaired by the device of following Delaware law where applicable and modifying it where necessary.

In so doing, the Court, guided by the equitable principles of *Brown II, supra,* is acutely aware that broad flexibility is required by the NCCPBE in administering the schools and that a judicial decree must not "significantly impinge on the educational function." *Swann, supra,* 402 U. S. at 30-31. At the same time, the Court recognizes if the cost of public education to the local taxpayer becomes unrealistically high, the entire desegregation effort could totter and ultimately crumble under the heavy financial weight associated with it. Although not directly caused by desegregation, increasing taxes resulting from a uniform tax rate throughout the desegregation area are likely to be perceived as a consequence of desegregation even though the cost of desegregation itself is relatively minimal.

In addition to statutory deficiencies, the other governance problems fall into two broad categories: (A) the method and timing for converting the governance body from an appointed unit to an elective body; and (B) the costs of operating the single district and the allocation of those costs.

** Judicial notice is taken that the Governor of the State of Delaware convened the Delaware General Assembly in special session on December 16, 1977, to attempt to pass governance legislation. Although a governance scheme must be designed so that it avoids frustrating a pupil assignment plan no effort was made to even consider a pupil assignment plan. Furthermore, the legislature adjourned without enacting legislation going to the limited issue of governance. No opinion is expressed concerning whether such action would have been timely.

A. Transition to An Elective Body

In formulating its proposed governance scheme, the three-judge court attempted to parallel Delaware law as reflected in the Educational Advancement Act, 14 *Del. C.* §§ 1001 *et seq.* Accordingly, a five person board was appointed in conformance with statutory reorganization provisions. *See* 14 *Del. C.* § 1065. "[T]o provide some geographical range and population equality," the three-judge court stipulated that one member of the governing board "shall be appointed from the present Wilmington Board; one from the Newark Board; one from either the New Castle-Gunning-Bedford, DeLaWarr or Conrad Boards; one from Stanton, Marshallton-McKean or Alexis I. DuPont; and one from Alfred I. DuPont, Mount Pleasant, or Claymont." 416 F. Supp. at 358.

The NCCPBE has recommended that this scheme of representation be carried forward for the unitary district.* Because, however, the suggested composition is predicated upon retention of districts that will cease to exist upon operation as a unitary district, the Court declines to affix its imprimatur to such a formulation. Rather, incorporating to the extent feasible provisions of State law and the desires of the NCCPBE, the Court approves the following framework for the transitional governance of the unitary district.

Governance of the reorganized desegregation area will continue to be performed by the presently constituted NCCPBE until June 30, 1978. Thereafter, the presently constituted NCCPBE will become the New Castle County Board of Education (NCCBE) with the individual membership serving until June, 1980. The Court believes it necessary to adopt such a procedure in order to assure

* Doc. 696, at 5-6.

continuity and guarantee that the NCCBE will have the opportunity to function as a cohesive governance unit to assess strengths, bolster weaknesses, and resolve problems as the desegregation process continues to unfold. Further counterbalancing the obvious desirability of rapid return to an elected board is the prospect of a bitter and divisive election in the latter part of the first school year of desegregation. Because the composition of the governance unit will not change during the period, the unitary district shall not conduct the election outlined in 14 *Del. C.* § 1045(b) in 1978 or 1979.

Commencing in 1980, the procedure that shall be employed is as follows. The State Board of Education shall by lot determine the initial terms of office of the present members of the NCCPBE, causing one member's term to expire in June of 1980 and one of the remaining terms to expire in each of the four succeeding years, respectively. One member of the five person school board thus shall be elected each year. *See* 14 *Del. C.* § 1052(c). The school board that will result upon completion of a five year cycle shall be composed of one representative from the City of Wilmington proper and four members each representing attendance areas in the pupil reassignment arrangement adopted by the NCCPBE.* The State Board of Education shall assure that each outgoing mem-

* Virtually without exception, the 9-3 pupil assignment concepts proffered utilize four attendance areas. Accordingly, the Court assumes that the NCCPBE will implement a formulation containing four attendance zones. It is stressed, however, that the Court does not mandate use of four zones, does not wish to dictate attendance area boundaries and does not desire to circumscribe NCCPBE flexibility in this regard. If the NCCPBE should adopt a final pupil assignment scheme that does not employ four zones, it is directed to make a formal motion for adjustment of the defined election procedure.

ber is succeeded by a member from the attendance area conforming geographically as closely as possible * to the area represented by the outgoing member.** Each representative shall serve a five year term. *See* 14 *Del. C.* § 1052(d). Each member shall be a citizen of Delaware and resident of the area in which elected *** and shall be qualified to vote at a school election of the unitary district at the time of such election. *See* 14 *Del. C.* § 1052(b). This election scheme shall continue at least until 1985.

The Court is aware of the possibility during the transition period for dual representation, lack of geographic representation, and imperfect representation.**** These

* The Court recognizes that the attendance areas will not specifically conform to the geographic district alignments utilized by the three-judge court. The State Board must only make a reasonable effort to replace a given geographic district alignment with a representative from the appropriate attendance area, assuring in any event that by 1985 each of the four attendance areas will be represented.

** For voting purposes, the attendance zones are those to be adopted by the NCCPBE excluding those portions of Wilmington proper within the zones. This exclusion is necessary to assure that all areas fairly represented and that Wilmington, which independently is afforded a member, does not receive undue representation.

*** Thus each representative of an attendance area must reside within that area. Similarly, each Wilmington representative must reside within the City of Wilmington proper.

**** Dual representation and lack of geographic representation could result for a limited time because the attendance area that for election purposes will replace the geographic district boundaries differs in configuration from the former district boundaries. Thus, a given geographic area temporarily may have two, or zero, representatives on the NCCPBE. The Court perceives no great harm should this eventuate because the geographic areas in question have demonstrated a remarkable similarity of interests and positions. To the extent a harm does occur, it will be temporal in nature because at the end of a complete five-year voting cycle, the entire desegregated area will be represented.

Imperfect representation is possible, if, and to the extent that the NCCPBE utilizes lateral transfers from one attendance zone to

considerations are outweighed, however, by the benefits of the mandated scheme. First, the decision to require an elected school board conforms to the procedure presently employed by nine of the eleven component districts.* Second, the overall procedure is based not upon district lines that will cease to exist, but rather upon functionally determined attendance zones. Third, the procedure comports in general terms with State law. *See, e.g.,* 14 *Del. C.* §§ 1051 *et seq.* Fourth, the procedure assures continuing representation of plaintiffs' rights by including a school board slot for a resident of the City of Wilmington.

Assuring a representative from Wilmington proper enables the Court to decline a function urged upon it by plaintiffs but which it believes best performed outside the judicial realm. Plaintiffs have suggested that the Court should either continually monitor the transition to desegregation or formally appoint monitors to oversee the process.* The Court regards the daily business of running the schools, even during desegregation, as peculiarly the function of State and local officials. *See Milliken II, supra,* 97 S. Ct. at 2757. The inclusion of Wilmington proper participation on the governance unit assures representation of plaintiffs' interests and facilitates the Court's desire to studiously avoid undue interference with school board functions.

**** (Cont'd.)

another as a part of its pupil assignment scheme. In that case, a parent may vote for a NCCPBE member in an attendance area different from that in which the parent's child attends school. The Court emphasizes that it does not restrict such transfers and the NCCPBE may effectuate them to the extent educationally desirable and/or necessary. Any resulting harm to the voting scheme is insignificant because attendance zones will not be autonomous districts and all NCCPBE members will be serving the educational interests of the entire unitary district.

* *See* n. **** *supra,* p. A115.

* *See, e.g.,* Doc. 363 I, at 81-84 (Johnson).

Finally, the provision that this election scheme shall control at least until 1985 is necessary to guarantee an effective transition to a racially nondiscriminatory unitary school system. The designated timing assures a complete turnover of district aligned NCCPBE seats and thus eliminates reference for voting purposes to districts no longer extant. Additionally, the requirement meshes with the date set for cessation of State defendants' responsibility for financing the costs of desegregation. *See* text *infra,* at 127.

B. Operating Costs of the Single District

1. *Authorization for Setting a Local Tax Rate*

In Delaware, public school education is financed through a combination of state and local support. To supplement the state's contribution, the local school districts individually impose a tax upon the assessed value of real property located within their respective boundaries.* In recent years the eleven district combined local supplement has averaged between 31.03% and 34.80% of the current expense budget of public schools in the desegregation area.** Therefore, although the primary source of fi-

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* 19 *Del. C.* §§ 1901 *et seq.*

** Percentages have been calculated from NCCPBE Exh. 19:

1972-73	31.03%
1973-74	33.12%
1974-75	34.80%
1975-76	33.22%
1976-77	34.44%

NCCPBE Exh. 19 represents the most complete cost data in evidence. At first blush there would appear to be several slight inconsistencies between data included in NCCPBE Exh. 19 and that in NCCPBE Exh. 1. The total projected tax yield of $32,998,490

nances for public education in the desegregation area is the State of Delaware, it cannot be said that the contribution by the local districts is insignificant. Notwithstanding a notable drop in enrollment, the expenditure by both the State of Delaware and local districts has pressed steadily upward both in terms of absolute dollars and on a per pupil basis. The increased spending in terms of absolute dollars despite declining enrollment belies any assertion that the level of state support to public education varies directly with student enrollment. This is illustrated by the following Chart 1, calculated from NCCPBE Exh. 19.

Despite increasing dollar contributions from both state and local authorities, the eleven local districts comprising the desegregation area operate at significantly disparate levels of support. In addition to severe differentials in assessed value of real estate (tax base), the financial disparity between local districts has been compounded because each local district establishes its own school tax rate, ranging for current operating expenses alone from a low of $0.84 for the Conrad District to a high of $2.669 for the Wilmington District.

** (Cont'd.)

(NCCPBE Exh. 1, at D-53) for 1977-78 is lower than $36,023,798, the amount actually spent from local funds for 1976-77, perhaps because expenditures were made from reserves and delinquent tax collections. NCCPBE Exh. 19, at 3. Because actual level of expenditure is the controlling criterion, the information contained in NCCPBE Exh. 19 will be deemed dispositive.

It is noted, however, that NCCPBE Exh. 19 does not reflect the state's entire contribution toward current operating expenses. *See* Doc. 691. The most significant item missing is transportation, which is 100% state funded except for handicapped children. *Id.* The effect of exclusion of this item is to slightly inflate the percent of supplemental contribution by the local districts. Finally, comparable statistical data to that found in NCCPBE Exh. 19 for the current fiscal year (1977-78) will not be available until June 30, 1978. Doc. 691.

CHART 1

Years	Enrollment	State Funds	Local Funds	Combined State and Local Funds	State Funds Per Pupil Expenditure	Local Funds Per Pupil Expenditure	Combined State and Local Funds per Pupil Expenditure	Percentage Increase - State Funds Over Prior Year	Percentage Increase - Local Funds Over Prior Year	Percentage Increase Combined State and Local Funds Over Prior Year	Percentage Increase Per Pupil Expenditure State Funds Over Prior Year	Percentage Increase Per Pupil Expenditure Local Funds Over Prior Year
'72-'73	84,961	$56,856,657	$25,580,660	$82,437,317	$669.21	$301.09	$ 970.30					
'73-'74	83,289	58,890,788	29,169,567	88,060,355	707.07	350.22	1057.29	3.57	14.03	6.82	5.66	16.32
'74-'75	81,280	62,191,228	33,189,041	95,378,269	765.15	408.31	1173.46	5.60	13.77	8.31	8.21	16.59
'75-'76	78,524	64,937,207	32,306,253	97,243,460	826.97	411.42	1238.39	4.41	- 2.65*	1.95	8.08	.76*
'76-'77	74,063	68,576,393	36,023,798	104,600,191	925.92	486.39	1412.31	5.60	11.50	7.57	11.97	16.22
'77-'78	72,590	(Not Available Until June 30, 1978)**										

* Loss in local district revenue was offset by declining enrollment on a per pupil expenditure basis.

** Doc. 691.

The accompanying Chart 2 and graph (Chart 3) demonstrate the marked financial differences between the local districts. For example, Alexis I. has a per pupil tax base of $70,594 compared to DeLaWarr's $22,375. The luxury of a high per pupil tax base enables Alexis I. to expend local funds of $718.43 per pupil compared to DeLaWarr's $262.92, even though Alexis I. has a current expense tax rate of $0.888, only slightly higher than DeLaWarr's $0.8635.

At $724.10, Wilmington has the highest per pupil expenditure from local funds, although its tax base of $30,006 is the fourth lowest of the eleven local districts. This lofty expenditure occurs because Wilmington set the highest tax rate of the eleven districts, $2.669 for current operating expenses. The figure is 97% higher than that of Newark, the next highest district, with a tax rate of $1.352. As a consequence, Wilmington's per pupil local fund expenditure is $319.09 more than the $405.01 per pupil local fund expenditure of Newark. The net result is that Newark educates 3397 more students than Wilmington for $2,888,420 less in local funds. Stated differently, Newark provides a public school education for 25% more students than Wilmington at 70% of the local cost of Wilmington.

The financial muddle is further complicated because some districts, such as DeLaWarr, have managed to qualify for state support, over and above that provided evenly to all districts.* As a consequence, although a correlation exists among districts between per pupil expenditure from local funds and combined state and local funds, that correlation is not precise, particularly as between the districts

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* DeLaWarr appears to have an unusual number of special students who qualify for state support. *See* D. P. I. Exh. 8, App. A, at unnumbered 4.

CHART 2

District	Enrollment ('76-'77)*	Assessed Value of Real Estate**	Yield**	Assessed Value of Real Estate Per Pupil Based Upon '76-'77 Enrollment Data***	Current Expense Real Estate Tax Rate Per $100**	Per Pupil Expenditure Based Upon '76-'77 Enrollment Data****
Alexis I.	3,089	$218,064,550	$1,936,413	$ 70,594	$ .888	$ 718.43
Alfred I.	9,105	383,238,899	4,077,661	42,091	1.064	541.16
Claymont	3,052	96,146,100	990,304	31,503	1.03	406.72
Conrad	4,827	152,844,000	1,283,889	31,664	.84	401.25
DeLaWarr	2,864	64,081,340	553,342	22,375	.8635	262.92
Marshallton/ McKean	3,364	116,979,167	1,234,130	34,774	1.055	417.27
Mt. Pleasant	4,409	182,971,451	1,902,903	41,500	1.04	545.38
New Castle Cunning-Bedford	8,529	236,405,940	2,080,372	27,718	.88	289.99
Newark	16,761	477,199,890	6,451,742	28,471	1.352	405.01
Stanton	4,699	153,483,650	1,785,014	32,663	1.163	468.03
Wilmington	13,364	401,001,153	10,702,720	30,006	2.669	724.10

* NCCPBE Exh. 19. Source data is 1976-77 enrollment figures by district. The data is slightly contaminated by a small number of voluntary transfer students who attended school outside their districts. The 1976-77 data was deemed preferable to the later 1977-78 enrollment data by district because the latter is sufficiently contaminated by voluntary transfers to be seriously misleading. The per pupil expenditure figures are therefore somewhat inaccurate because enrollment dropped 1473 students between the 1976-77 and 1977-78 school years. For purposes of highlighting the inequities between districts, however, the distortion is minimal.

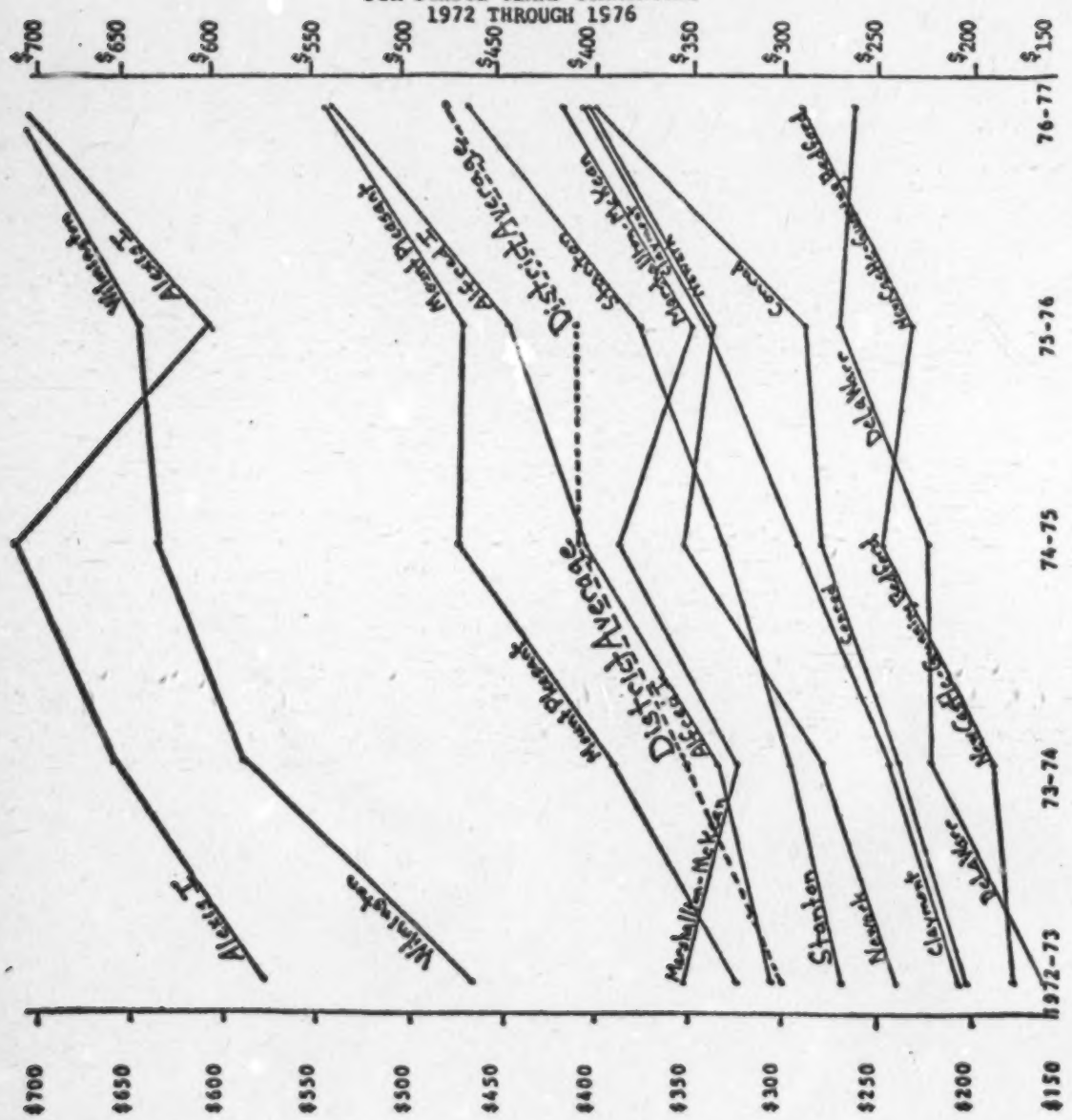
** NCCPBE Exh. 1, at D-53.

*** Assessed value of real estate divided by enrollment.

**** Calculated from NCCPBE Exh. 19.

CHART 3

LOCAL FUNDS PER DISTRICT
FOR SCHOOL YEARS COMMENCING
1972 THROUGH 1976



with the lower per pupil expenditures from local funds.* As can be seen from the following charted bar graph (Chart 4), although DeLaWarr is the lowest district in tax base and per pupil expenditure from local funds, and would thus be expected to rank lowest in per pupil expenditure from combined state and local district funds, it in fact ranks above New Castle-Gunning Bedford, Newark, and Claymont. Also curious is that despite an attempt to equalize, the addition of state funds aggravates rather than mitigates the difference in per pupil expenditure between the districts.*

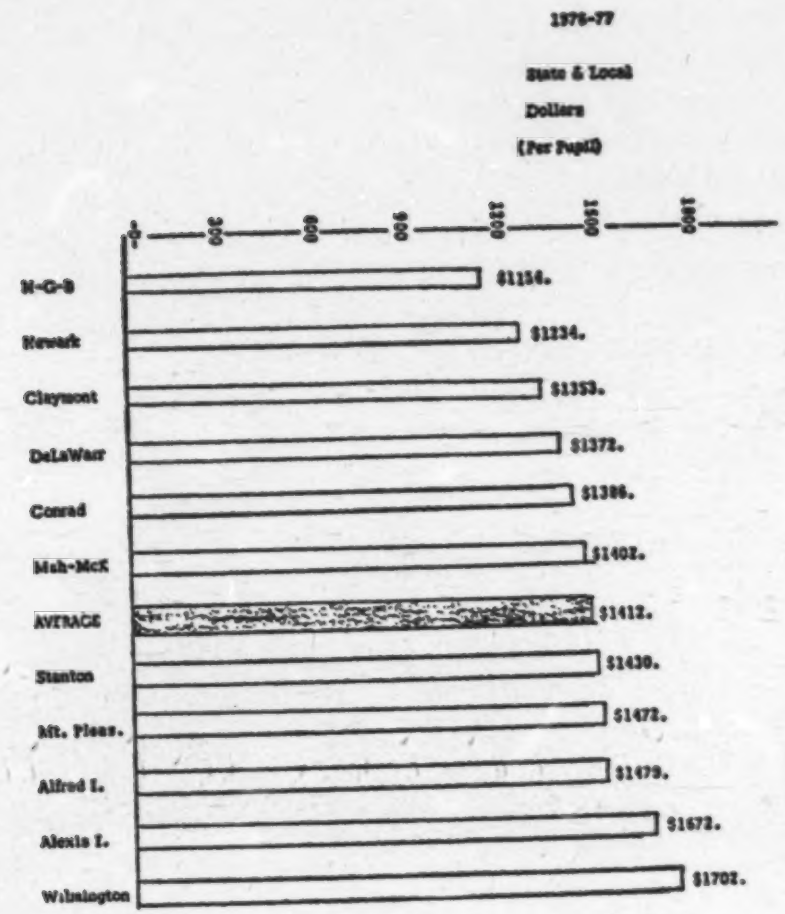
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* Following are the districts ranked from lowest per pupil expenditure from local funds to the highest, compared with respective ranking in combined state and local expenditure per pupil. The figures in ($) represent the actual respective expenditures per pupil based on 1976-77 enrollment data. Sources are NCCPBE Exh. 1, at D-53; NCCPBE Exh. 19; and calculations made therefrom:

District	*Ranking From Lowest to Highest by District of Per Pupil Expenditure From Local Funds*		*Ranking by District of Per Pupil Expenditure From Combined State and Local Funds*	
DeLaWarr	1	($262.92)	4	($1372)
New Castle-Gunning Bedford	2	($289.99)	1	($1154)
Conrad	3	($401.25)	5	($1386)
Newark	4	($405.01)	2	($1234)
Claymont	5	($406.72)	3	($1353)
Marshallton-McKean	6	($417.27)	6	($1402)
Stanton	7	($468.03)	7	($1430)
Alfred I.	8	($541.16)	9	($1479)
Mount Pleasant	9	($545.38)	8	($1472)
Alexis I.	10	($718.43)	10	($1672)
Wilmington	11	($724.10)	11	($1702)

* The State of Delaware, through defendant D. P. I., initially finances the various districts with a constant level of support, *see* 14 *Del. C.* §§ 1701 *et seq.*, and also provides a method to obtain equalization funds. *See* 14 *Del. C.* § 1707. Because of the widely varying tax bases and tax rates between local districts, the amount spent on each pupil per district continues to be vastly different

CHART 4



In summary, as illustrated on Chart 2, there now exist in the desegregation area eleven different per pupil tax bases. The predominantly white district of Alexis I. has

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* (Cont'd.)
despite "equalization". The greatest difference in per pupil local expenditures is $461.18. *Compare* Wilmington *and* DeLaWarr. When state and local funds are combined, the differential jumps $87 to $548, the difference between Wilmington at $1702 and New Castle-Gunning Bedford at $1154.

a $70,594 per pupil tax base, over three times that of DeLaWarr and over twice that of seven other districts. In addition, there are eleven separate local per pupil expenditure rates varying from $724.10 to a low of $262.92, with the local per pupil expenditure of two districts (predominantly black Wilmington and predominantly white Alexis I.) being roughly two and one-half times that of the two lowest districts (predominantly black DeLaWarr and predominantly white New Castle-Gunning Bedford). Further, as denoted on Chart 2, there are eleven widely varying tax rates, so disparate that the highest tax rate (predominantly black Wilmington) is three times greater than that of four of the districts and more than double most of the other districts. The enormity of the disparity is further highlighted by realizing that Alexis I., with one of the lower tax rates, produces the second highest per pupil local supplement, only some $6 behind Wilmington.

Creation of one district requires that one tax base consisting the total assessed value of real estate in the desegregation area be substituted for the eleven disparate tax bases; that one rate for pupil expenditure from local funds supplant the present eleven; and, most importantly, that one tax rate be applied evenly throughout the desegregation area. Imposition of a single tax rate carried with it several ramifications. Redistribution of school tax burden throughout the entire desegregation area will eradicate existing disparities and resultant inequities between present districts. Equalizing the per pupil expenditure, however, requires a tax increase in ten of the eleven districts.

With these preliminary observations in mind, attention is devoted to the necessity for setting a school tax rate. Authorization to set a school tax rate is properly a product of the political process. For that reason, it is my view a federal court should not become involved failing a total

abdication of responsibility over a period of time such that further delay significantly jeopardizes constitutional rights. In this regard, over two years have passed since the Supreme Court summarily affirmed the existence of a constitutional violation,* and over seven months have elapsed since the Third Circuit affirmed the propriety of an interdistrict remedy.** In the interim, a scheduled September 1977 date for commencement of implementation of a remedy to redress the constitutional violation was stayed *** pending the October 4, 1977 denial of certiorari applications in the Supreme Court.****

From evidence adduced at the 1977 July, October, and November hearings, the Court finds it abundantly clear that the luxury of further delay comes at the cost of endangering an orderly transition to a racially nondiscriminatory unitary school system. That cost cannot be afforded by the children and their parents, school administrators, teachers, and the citizenry of the desegregation community. Planning has been going forward on a broad scale. The time for hiring the top administrative staff is now here with the NCCPBE being compelled to make financial decisions in a revenue vacuum. Similarly fast approaching is the time for commencement of collective bargaining.***** Because a substantial portion of administrators' and teachers' salaries is paid from local funds, personnel matters cannot effectively proceed without establishing a local tax rate or, at least, the parameters for that rate.

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* 423 U. S. 963 (1975).

** 555 F. 2d 373 (3d Cir. 1977).

*** 435 F. Supp. 832 (D. Del. 1977).

**** 46 U. S. L. W. 3220 (U. S. Oct. 4, 1977).

***** *See* Doc. 632 (Order setting in motion the process for election of a bargaining representative); Doc. 689 (Memorandum Opinion on a related matter).

It is with deep seated reluctance overcome only by the pressing, immediate necessity and the realization that no other option is available to fill the legislative void that the Court becomes involved at all in matters of taxation. Were it not true that the desegregation process faces imminent peril unaddressed by any other practical alternative, the federal court would not intrude. If the political process had provided statutory machinery or a procedure for devising a tax rate for the single district, or if there were not an immediate need to act now, I would further defer the matter of local tax rate authorization.

The Court is compelled, however, to order that a tax rate be established. This action is taken with the understanding that the Legislature can alter the parameters authorized. Because state political processes are preferred over even limited intervention by a federal court, the Delaware Legislature may raise or lower the tax authorization established here. The Court must caution, however, that any legislative action that lowers the established tax rate below a generally acceptable rate to a point at which the desegregation process would be imperiled will be received skeptically. Given the historical stance of the Legislature, if such a lowering occurs, the usual presumption of legislative regularity will not attach. If, an an alternative, the Delaware Legislature makes provision for replacement of the authorized revenue lost through reduced local school tax rates, the local school tax rate can be lowered to any level or even eliminated.*

Authorization for a local tax rate involves the dual questions who should be authorized to set the tax rate and

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* If public education is to survive in its present form, the declining birth rate coupled with concomitant declining enrollment and the increased aging of the population graphically display the necessity for replacing the referendum as the only method of supplementing education finances. Such a decision is a political matter properly left to the political processes.

what upper limit should be placed on that power. In keeping with the principle of minimizing federal intrusion, the Court rejects any notion that it should establish the tax rate for the desegregation area. Instead, the determination who should be the taxing authority for the reorganized single district will be answered by resort to the system used for a reorganization pursuant to the Educational Advancement Act.** Under that Act, the power to establish a tax rate is lodged in the "school board of the reorganized district."*** Accordingly the school board of the single district is authorized to establish the local school tax rate for the single district.

The tax rate for the single district consists of four components: (1) current operating expense, (2) debt service, (3) tuition, and (4) minor capital improvements. The last three items constitute necessary obligations and are relatively fixed in total amount of obligation even though the eleven individual districts have a different tax rate for each item.* Following state law for securing debt

** 14 *Del. C.* §§ 1001 *et seq.*

*** 14 *Del. C.* § 1010.

*

District	*Debt Service*	*Tuition*	*Minor Capital Improvements*	*Total by District*
Alexis I.	$ .32	$ .02	$ .011	$ .351
Alfred I.	.216	.039	.018	.273
Claymont	.18	.07	.01	.26
Conrad	.09	.08	.03	.20
DeLaWarr	.29	.64	.1165	1.05
Marshallton-McKean	.21	.06	.055	.325
Mount Pleasant	.175	.042	.023	.24
New Castle-Gunning Bedford	.26	.02	.05	.33
Newark	.313	.035	.03	.378
Stanton	.30	.04	.05	.39
Stanton	.30	.04	.05	.39
Wilmington	.271	—	—	.271

Compilation and computation is from NCCPBE Exh. 1 at D-49, D-57, D-59, based on anticipated yield 1977-78.

service and minor capital improvements,** and seeking to retain the dollars generated by tuition charges, the NCCPBE has calculated that an equalized tax rate for these items throughout the single district would be $.32.***

Having carefully reviewed the available data and found the same to be correct, the Court authorizes the NCCPBE to set a tax of up to $.32 for these items for the fiscal year commencing July 1, 1978. Specifically, the NCCPBE and its successor are limited to $.24 to meet all debt service obligations for fiscal year 1978,* and every year thereafter may set such amount as is sufficient to satisfy its bond obligations. A level tax rate sufficient to satisfy tuition requirements of the component districts is $.04896, and a level rate of $.027** is required for minor capital improvements. Thus the NCCPBE and its successor are authorized to set a tax rate of up to $.05 for tuition,*** and up to $.03 for minor capital improvements for the fiscal year commencing July 1, 1978, and all sub-

** 14 *Del. C.* § 1406.

*** NCCPBE Exh. 1, at 18.

* The actual rate would be $.25, but anticipated carry-over balances from the component districts permit a reduction to $.24 as the amount needed by the single district to meet the debt service obligations of all the component districts for the fiscal year commencing July 1, 1978.

** The NCCPBE stated: "An equalized Minor Capital Improvement Tax rate for a single district to yield [the present] $667,614 on a combined assessment of $2,482,416,140 would be $.0279 on each $100 of assessed valuation." Verification of the computation revealed the rate is closer to $.0270. NCCPBE Exh. 1, at D-59.

*** In a single district, costs for tuition should drop significantly, despite continuation of payments presently made from tuition revenues for charges originating outside the affected area and the costs of transportation to specialized schools. But any reduction in tuition which might occur has no effect on the needed revenue yield. At best, only the revenue category would change from tuition to current operating expense.

sequent years.**** This authorization up to $.32 for the fiscal year commencing July 1, 1978,* must be added to whatever amount is established by the NCCPBE as the tax rate for current operating expenses.

Attention is now turned to the difficult matter of establishing a maximum amount that the NCCPBE may fix as the tax rate necessary to meet current operating expenses.** The NCCPBE correctly points to 14 *Del. C.* § 1010 as authorizing the school board to establish an adjusted tax rate "which may be sufficient to maintain in and throughout the reorganized school district a per pupil expenditure level equivalent to that of the highest per pupil expenditure level of any of its component former school districts." The New Board then deduces it should be authorized to establish a local current operating expense tax rate of up to $2.669, Wilmington's current rate, producing a per pupil expenditure of $724.10.***

Defendant State Board urges the NCCPBE should not be permitted such a high maximum limit on its authority to establish a local current operating expense tax rate. Although the State's proposed formulation is ambiguous, the NCCPBE interprets the State Board's position

**** If the NCCPBE feels there is required broader tax authorization similar to that provided for debt service for tuition and minor capital improvements for subsequent fiscal years, it should file a motion seeking amendment of the Order to be entered pursuant to this Opinion.

* By reference to the Chart in n. *, *supra*, p. A186, residents of the respective districts can determine whether the leveling of rates for debt service, tuition, and minor capital improvements increases or decreases this portion of their local school tax charge.

** An increase of one cent in the current expense tax rate yields $248,241. NCCPBE Exh. 1, at D-54.

*** In reality, a current operating expense tax rate of $2.413 produces $9,676,842 on an assessed tax base of $401,001,153 which, in turn, yields Wilmington's per pupil expenditure of $724.10. NCCPBE Exh. 19. Because it makes no difference in the outcome, however, the Wilmington published current expense rate of $2.669 has been and will be used throughout this Opinion.

as in effect establishing the maximum authorization for current operating expenses "upon the basis of the average per pupil expenditure in the eleven districts plus an additional ten percent." * In the context of this case, a significant difference exists between a tax rate based upon current per pupil expenditures and one based upon current expense tax revenues. A closer reading of the State Board's position reveals that under its proposal per pupil expenditure is in reality limited to current expense tax revenues plus 10%,** thus resulting in a lower rate than that deduced by the NCCPBE.

* Doc. 692.

** Doc. 693 contains the proposal from defendant State Board. One cannot say it is unequivocal; at one point "per pupil expenditures" is mentioned thusly:

> "It is the State's position that a tax rate which would yield local revenues in an amount consistent with the amount presently generated in accordance with per pupil expenditures is consistent with existing law. . . ."

At a later portion of Doc. 693, however, the State Board becomes very specific, shifting the emphasis from per pupil expenditure to "present revenues". Quoted below is the State Board formulation, with the actual projected mathematical calculations in brackets following each step.

> "'The school board of the new district may without election or referendum, in addition to the amounts apportioned to it by the State Board of Education or appropriated to it by the General Assembly, levy and collect additional tax for current expenditures for fiscal year 1979 according to the following procedure:
>
> 1. Divide the total local current expense tax dollars collectible in the entire area being reorganized, as established for the fiscal year ending June 30, 1978, as computed using the assessed value and tax rates contained in *Assessments and Tax Rates*, Delaware Public Schools 1977-78, Department of Public Instruction, August, 1977, by the total pupil enrollment in the entire area, as certified by the State Board of Education as a result of the count of enrollment on September 30, 1977.

$$\left[\frac{\$32{,}040{,}177}{72{,}590} = 441.39\right]$$

After careful consideration, the Court concludes neither the position of the NCCPBE nor that of the State Board should be adopted. The position of the State Board is rejected because, if in fact its formula is based upon current expense tax revenues plus ten percent, the procedure is contrary to state law and, on the information available in the record, would most likely constitute a reduction in per pupil expenditure from that which now applies. In contrast the position of the NCCPBE is rejected although it comports strictly with 14 *Del. C.* § 1010 as well as this Court's philosophy of placing maximum flexibility in the NCCPBE. Although the legal position of the NCCPBE, if viewed in isolation, is virtually impregnable, three underlying facts cause the Court to rule in a manner adverse to the New Board. In my view any *one* of the following facts mandate that equitable discretion be exercised by granting the NCCPBE tax authorization far short of that requested by the New Board and permitted by analogous state law although fully adequate to accomplish the job at hand. These facts are: (1) the NCCPBE has conceded

** (Cont'd.)

2. The per pupil amount determined in (1) above shall be increased by 10%.

[441.39 + 10% = 441.39 + 44.14 + $485.53]

3. The New Board of Education may set a tax rate for current expenses that would be adequate to yield up to the number of dollars per pupil provided in step (2) above.

4. To determine the tax rate the New Board shall multiply the dollars per pupil derived in step (2) above by the number of pupils resident in the new district who attend a public school in the area being reorganized during fiscal year 1978; the product would then be divided by the assessed value of property in the new district as determined during the fiscal year ending June 30, 1978."

[485.53 × 72,590 = $35,244,622 ÷ 2,482,140 =
a $1.42 current operating expense tax rate.]

$2,482,416,140 is the assessed value of property in the affected area. NCCPBE Exh. 1, at D-53.

through its representatives its requested authority is neither necessary nor realistic; * (2) the Wilmington current expense rate of $2.669, almost double that of the next highest district, is an aberration; (3) the Wilmington rate was set without the inhibition of a referendum and cannot be said to represent the will of the people.

What follows is a detailed analysis of the method employed to arrive at the maximum authority that may reasonably be afforded the NCCPBE in fixing the current operating expense component of the school tax.

The controlling principle is that insofar as practical a court should exercise its discretion in accordance with State law, always remaining mindful that the beleagured taxpayer ought not to incur a tax increase beyond that absolutely essential for effective reorganization. Pursuant to 14 *Del. C.* § 1010, the starting point for constructing a tax rate in a reorganized district is the per pupil expenditure for the fiscal year prior to reorganization.* Because reorganization must be fully effective as of July 1, 1978, it follows that the per pupil expenditure of the school year 1977-78 should control. Unfortunately, however, the unavailability of per pupil expenditure data for the current school year until June 30, 1978 ** necessitates the use of well informed estimates.

Having declined to adopt and adjust the 1976-77 per pupil expenditure figure ($724.10) of the highest district, the Court logically should next consider the Alexis I. District, with the second highest per pupil expenditure at

* *See, e.g.*, Doc. 663E, at 61 (Kirk):

"Yes, I think that is much too high as a tax rate in this county, based on what now exists and the cost to the taxpayer."

* 14 *Del. C.* § 1010 authorizes an adjusted tax rate at a level "equivalent to that of the highest per pupil expenditure level of any of its component districts."

** Doc. 691.

$718.43 for 1976-77. But Alexis I. contains an extraordinarily large tax base and may more reasonably be considered as aberration than a suitable model upon which to pattern the other districts. Consequently, Alexis I. is rejected as the benchmark for the single district. The choice then becomes whether to use the per pupil expenditure of the next highest district, Mount Pleasant, or an average of the eleven districts with an adjustment, to achieve as nearly as is practicable the Delaware statutory goal of keying the current operation expense tax rate to the district with the highest per pupil expenditure. Calculations reveal these two methods to produce only a slight difference in result.

The best method for arriving at estimates for the per pupil expenditures in the current 1977-78 school year is to rely on historical fact and percentage increases over time. Fortunately, all necessary data is in the record.* From this data one can compute a maximum tax rate that provides a sufficient yield to operate the schools, comports with the spirit of extant statutes, and limits to some reasonable degree the burden on the taxpayer. The actual calculations of the following seven steps are shown on Chart 5, which appears at the end of the textual description of the seven steps.

The first step in limiting the power of the NCCPBE to fix the current operating component of the local tax rate is to ascertain the percentage rate of increases for the last five school years for which hard data is available. This is accomplished by subtracting the per pupil expenditure of a former year from that of the following year and dividing the resultant number by the per pupil expenditure of the former year.

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* NCCPBE Exh. 19.

CHART 5

	11 District Average		Mount Pleasant	
Step 1				
Year	**Per Pupil Expenditure**	**% Increase of Per Pupil Expenditure Over Prior Year**	**Per Pupil Expenditure**	**% Increase of Per Pupil Expenditure Over Prior Year**
1972-73	$ 301.09		$ 325.06	
1973-74	350.22	16.32%	390.49	20.13%
1974-75	408.31	16.59%	473.72	21.31%
1975-76	411.42	.76%*	470.75	-.63%*
1976-77	486.39	18.22%	545.38	15.85%
		51.89		56.66
Step 2	$\frac{51.89}{4} = 12.9725$		$\frac{56.66}{4} = 14.165$	
Step 3	$ 486.39 x .129725 = $63.10		$ 545.38 x .14165 = $77.25	
Step 4	$ 486.39 63.10 $ 549.49		$ 545.38 77.25 $ 622.63	
Step 5	$ 545.38 -486.39 $ 58.99 $\frac{58.99}{486.39} = 12.13\%$ $ 549.49 x .1213 = $66.65 $ 549.49 66.65 $ 616.14		NOT APPLICABLE	
Step 6	$ 616.14 x 1.05 = $646.95		$ 622.63 x 1.05 = $653.76	
Step 7	$ 646.95 x 72,590 = $46,962,100 = T.R. = $1.89		$ 653.76 x 72,590 = $47,456,438 = T.R. = $1.91	

* The 1975-76 percentages are obviously attributable to poor tax collections during the recession. Recessions are economic facts of life and in every real sense act as a restraint on spending. However, an analysis of recent per pupil expenditures demonstrates that in 1976-77, the local districts spent more than 3 million dollars in per pupil expenditure than was received in current operating expense revenue for the same period. Therefore, it seems appropriate not to "throw-out" the 1975-76 year.

Step 2: Thereafter, the percentage increases should be aggregated and divided by 4.

Step 3: The resultant number from Step 2 is converted from a percentage average to a decimal number. Thereafter the 1976-77 per pupil expenditure is multiplied by the decimal figure to ascertain the absolute dollar amount that the per pupil expenditure will most likely have increased from the 1976-77 school year to the current 1977-78 school year.

Step 4: The probable dollar amount of per pupil expenditure increase for the current year is added to the per pupil expenditure for the 1976-77 school year yielding the probable per pupil expenditure for the current school year. As can be seen from the computations, the per pupil expenditure for the current year on an eleven district average basis is about $549.49, compared to about $622.63 for Mount Pleasant.*

Step 5: The eleven district average pupil expenditure is adjusted pursuant to the clear statutory requirement of using the highest per pupil expenditure of the component districts of the reorganization area. This adjustment was made by ascertaining the dollar amount by which the Mount Pleasant per pupil expenditure exceeded the eleven district average. Thereafter, that dollar amount was converted to an adjustment figure of 12.13% by dividing the dollar amount by the 1976-77 eleven district average per pupil expenditure. The percentage adjustment figure is then converted to a decimal and multiplied by the $549.49

* Calculated projections for the current year would indicate Alfred I. at $624.57 has passed Mount Pleasant at $622.63 for per pupil expenditure in 1977-78. Because the hard data places Mount Pleasant as the higher of the two over the last five years and because of a preference for hard data, Mount Pleasant was considered a more reliable indicator of the district with the highest per pupil expenditure.

figure from Step 4. The resulting dollar figure is then added to the $549.49.

Step 6: The per pupil expenditure figure of $616.44 resulting from Step 5 of the now adjusted eleven district average and the $622.63 figure from Step 4 for Mount Pleasant must next be adjusted for the actual additional costs of desegregation, a cost element not contemplated by the present Delaware statutes. Independent of their analysis, the State has suggested a ten percent increase to cover additional costs attributable solely to desegregation. Because of the disposition made with respect to those costs, the Court concludes 5% is sufficient. Adding 5% desegregation costs results in a per pupil expenditure of $646.95 on an adjusted eleven district basis and $653.76 for Mount Pleasant.

Step 7: The final step is to take each of the adjusted per pupil expenditure figures and multiply the same by the actual enrollment for the current year, 72,590. The resultant figure is the current operating expense tax yield necessary to cover the per pupil expenditure for the current year as adjusted. The tax yield figure is then converted into a tax rate necessary to raise the required funds. *See* NCCPBE Exh. 1, at D-54.

The preceding computations yield maximum current operating expense tax rates of $1.89 on an adjusted average eleven district basis and $1.91 if calculated directly against the rates for Mount Pleasant. Because use of the highest district per pupil expenditure more closely follows the statute than use of an adjusted average per pupil expenditure, the $1.91 figure is adopted.*

* 14 *Del. C.* § 1010 contains a limitation that upon reorganization the current operating expense tax rate not exceed forty cents over the highest current operating expense tax rate of the component districts. Although the $1.91 rate is well under that presently

From the foregoing analysis, it is concluded that the NCCPBE must be authorized to set a tax rate of up to $1.91 to cover current operating expenses and, in addition, any rate up to $.32 to satisfy debt service, minor capital improvements, and tuition. The New Board strongly is cautioned against using the full limit of its power during the early years of its governance of the single district. The full authorization is not surrendered if not used and the New Board is on notice that it will assume a greater share of the desegregation costs in future years as the state contribution diminishes. Furthermore, additional authorization will not be granted except for unforeseen circumstances over which the NCCPBE has no control and which could not be reasonably anticipated.* Consequently, because the New Board will have to live with these limitations until a referendum passes or the Legislature provides another method of school financing, prudence dictates holding as much of the authorization in reserve as possible.

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* (Cont'd.)
operative in Wilmington, one could argue that once rejected as the benchmark, Wilmington's rate ought not to be considered for any purpose. In that case, the $1.91 rate exceeds the sum of forty cents over the penultimate existing tax rate of Newark, at $1.352. The Educational Advancement Act is inconsistent with the $1.91 result but the Court notes that the Act was expressly directed to reorganization that occurred in the late 1960's. Strict adherence to it by use of the Newark rate plus forty cents, or $1.752, would result in a per pupil expenditure of $1.82 which is lower than that currently spent on each of the almost 30,000 children educated in Wilmington, Alexis I., Alfred I., and Mount Pleasant. Finally, application of the forty cent limitation ignores the reality that heavy use of current expense reserves has distorted the normally close relationship between tax rate and per pupil expenditure. *See* Chart 6.

* By way of guidance only, the NCCPBE is advised salary costs of administrators, teachers, non-certificated personnel and all other employees of the single district, and lack of a successful referendum pursuant to 14 *Del. C.*, Chapter 19 ,are not considered either unforeseen or circumstances over which the NCCPBE has no control.

CHART 6

District	'76-'77* Enrollment	Current Operating Expense Tax Yield ('76-'77)**	Current Expenditure Funds Actually Expended By District*	Total Pupil Expenditure By District In Excess of Tax Yield	Per Pupil Expenditure In Excess Of Tax Yield By District
Alexis I.	3,089	$ 1,936,413	$2,219,221	$ 282,808	$ 91.55
Alfred I.	9,105	4,077,661	4,927,230	849,569	93.31
Claymont	3,052	990,304	1,241,323	251,019	82.25
Conrad	4,827	1,283,889	1,936,850	652,961	135.27
DelaWarr	2,864	553,342	752,990	199,648	69.71
Marshallton/ McKean	3,364	1,234,130	1,403,700	169,570	50.41
Mt. Pleasant	4,409	1,902,903	2,404,597	501,694	113.79
New Castle Gunning-Bedford	8,529	2,080,372	2,473,341	392,969	46.07
Newark	16,761	6,451,742	6,788,422	336,680	20.09
Stanton	4,699	1,785,014	2,199,282	414,268	88.16
Wilmington	13,364	10,702,720	9,676,842	-1,025,878	-76.76

Source: * NCCPBE Exh. 19
** NCCPBE Exh. 1, at D-53

However cautious the New Board's approach, the Court is not unmindful that the financial impact will result in an increased economic burden upon all real property owners in the desegregation area except those in Wilmington. Other courts, however, have upheld constitutional provisions in their states requiring "a thorough and efficient education" notwithstanding the resultant economic hardships to local taxpayers.** *Robinson v. Cahill*, 70 N. J. 155, 358 A. 2d 457 (1976) (*"Robinson VII"*); *see Serrano v. Priest*, 18 Cal. 3d 728, 557 P. 2d 929, 135 Cal. Rptr. 345 (1976).

Moreover, the increased financial burden is largely a function of a single tax rate rather than a result of desegregation. In 1976-77, $36,023,798 was actually expended for current operating expenses.* Had the districts not been spending out of reserves, a level rate of $1.45 would have been required for current operating expenses alone.** Based on past spending patterns, it is estimated that this year, the average per pupil expenditure is $549.49.*** Multiplied by the 72,590 pupils currently enrolled in the desegregated area,**** the total expenditure is $39,887,479, which can be raised only if the system-wide tax rate for current expenses was set at $1.61. If the proposal of the State Board were followed and maximum authorization for a current expense tax rate fixed at $1.42,

** A similar provision requiring the General Assembly to establish and maintain a "general and efficient" system of free public schools appears in the Delaware Constitution, Art. X, § 1.

* NCCPBE Exh. 19, at unnumbered 3.

** This fact demonstrates the understandable, but fatal, error of confusing revenues earmarked for current operating expenses with actual current operating expenses. For an example of this phenomenon, *compare* NCCPBE Exh. 1, at 18, D-54 *with* NCCPBE Exh. 19, at unnumbered 3.

*** *See* Chart 5 *supra*, at Step 4

**** D. P. I. Exh. 4.

the NCCPBE would have to operate the new single district for the 1978-79 school year at a tax rate three cents less than was actually spent on a per pupil basis during the 1976-77 school year, and at a rate nineteen cents less than required by the projected per pupil expenditure for the current year.

The foregoing makes evident that increased taxation results from the imposition of a unitary tax, independent of any consideration of the costs of desegregation. The impact of equalizing the tax rate is especially severe because ten of the eleven districts, as a result of drawing against reserves, have spent a per pupil amount significantly higher than that provided by incoming tax revenues. If the integrity of per pupil expenditures is to remain intact as contemplated by state law, a tax rate that realistically comports with actual per pupil spending must be authorized. Because $1.61 is the tax rate required to yield the estimated current expenses for 1977-78 and $.32 is the tax rate necessary to satisfy debt service, tuition, and minor capital improvements, the sum of $1.93 is the minimum rate which represents an equalized tax. As illustrated by the accompanying Chart 7, even this amount represents a substantial increase, particularly for five districts whose tax rates increase by a rate of over 50%. If one takes the equalized tax and adjusts it upward to comport with Delaware law, setting the highest per pupil expenditure rate as the benchmark, the cost necessarily increases. The addition of 5% desegregation costs only completes the already expensive financial picture. Thus, as illustrated in Chart 7, if the NCCPBE were to utilize the full range of its power in setting a tax rate, one district would experience an increase of 114%, six others would incur raises well in excess of 50% of current rates, and another would suffer a 43% increase.

CHART 7

District	See text supra, at 1026. Current debt service, tuition and minor capital improvement tax rate	NCCPBE Exh. 1, at D-53 Current operating expense tax rate	Add Column 1 plus Column 2 Total current local school tax rate by district	See text supra, at 1026. Level current debt service, tuition and minor capital improvements resulting from an equalized tax base based on calculated current per pupil expenditure	See text supra, at 1033. Level current operating expense tax rate resulting from an equalized tax base and based on current per pupil expenditure	Add Column 4 plus Column 5 Level local tax rate resulting from an equalized tax basis (single district) over the current district local tax rate	Subtract Column 3 from Column 6; divide product by Column 3 Percentage of increase of equalized tax base over current district school tax rate	See text supra, at 1033-1033.1a Level maximum current operating expense tax rate resulting from equalized tax base adjusted for Delaware statutes plus 5% for costs of desegregation	Add Column 4 plus Column 8 Level maximum local tax rate resulting from equalized tax base adjusted for Delaware statutes plus 5% for costs of desegregation	Subtract Column 3 from Column 9 Dollar amount by which local tax rate based on an equalized tax base if NCCPBE uses maximum authorized rate per $100 of assessed valuation	Divide Column 3 by Column 10 Percentage increase of maximum authorized level school tax rate resulting from an equalized tax basis (single district) over the current district local tax rate
	1	2	3	4	5	6	7	8	9	10	11
Alexis I.	$.351	$ .888	$1.239	$ .32	$1.61	$1.93	56%	$1.91	$2.23	$0.991	80%
Alfred I.	.273	1.064	1.337	.32	1.61	1.93	44%	1.91	2.23	.893	67%
Claymont	.260	1.03	1.290	.32	1.61	1.93	50%	1.91	2.23	.940	73%
Conrad	.200	.84	1.04	.32	1.61	1.93	86%	1.91	2.23	1.190	114%
DelaWarr	1.050	.8635	1.914	.32	1.61	1.93	01%	1.91	2.23	.316	17%
Marshallton/ McKean	.325	1.055	1.38	.32	1.61	1.93	40%	1.91	2.23	.85	62%
Mount Pleasant	.240	1.04	1.28	.32	1.61	1.93	51%	1.91	2.23	.95	74%
New Castle - Gunning Bedford	.330	.88	1.21	.32	1.61	1.93	60%	1.91	2.23	1.02	84%
Newark	.378	1.352	1.73	.32	1.61	1.93	12%	1.91	2.23	.50	29%
Stanton	.390	1.163	1.553	.32	1.61	1.93	24%	1.91	2.23	.667	43%
Wilmington	.271	2.669	2.94	.32	1.61	1.93	-34%	1.91	2.23	.71	-24%

Because of the widespread nature and potential severity of the local school tax increase and the system of paying school taxes in advance and due September 30th of each year, it is absolutely essential that the local school tax rate be established as quickly as possible. Only by knowing the new school rate will the vast majority of the real property owners in the desegregation area have an opportunity to perform the necessary planning to meet their obligations. For that reason, the NCCPBE will be ordered to establish a local school tax rate for the single district by February 24, 1978, replacing the usual May date applied to reorganizations.*

2. *Governance—Allocation of Costs*

Consolidation of the eleven existing school districts requires an orderly transfer of authority from the existing school boards to the NCCPBE, which will become the governing body of the single school district by July 1, 1978. Reference to existing state laws provides at least some basis for an orderly transition. Accordingly, the manner of appointment of the NCCPBE and the subsequent election of its successor, as well as the determination of a maximum tax rate, were arrived at in accordance with the spirit of the Delaware statutory scheme.

All parties recognize the desirability of following State law, even though no existing enactment envisions administration of a single district of 70,000 students.* But although the parties agree that State law should govern to the extent feasible, they dispute the judicial treatment to be granted irrelevant and/or unsuitable provisions of

* *See* 14 *Del. C.* § 1021(e).

* The statutory provisions, particularly those providing for State funds, contemplate a district of some 12,000 children and are therefore inadequate to govern a district of 70,000. *See, e.g.*, 15 *Del. C.* § 1321.

the Delaware reorganization framework. The State Board's position is that alterations to present legislation, technical or otherwise, are exclusively the province of the Delaware Legislature. One can hardly disagree with that statement as a general proposition. But general propositions are unavailing in this unique situation because existing statutes would, if applied literally, be distinctly at variance with the successful operation of a single district.

Because the Legislature not only failed to pass governance legislation but also refused to modify State law to take cognizance of the unitary district, the NCCPBE is on the verge of assuming the considerable task of operating a large school system without guidance from any meaningful, comprehensive statutory scheme. Understandably, the New Board requires instruction concerning which of the numerous existing statutes apply and if and how they must be deemed modified. Absent legislative efforts, the Court must provide that guidance.

One alternative would be to fill the legislative void by devising an entirely new statutory framework under which the single district would conduct its affairs. In order to minimize federal court intrusion, this approach has been rejected. Instead, sections of the existing Delaware Code that would appear to be both inapplicable and troublesome to the NCCPBE have been identified and evaluated. Appended to the Order that will accompany this Opinion is a compilation of statutory changes of which the NCCPBE shall take note in the conduct of its affairs. This procedure possesses the advantage of retaining existing law to the greatest degree possible, a philosophy that has been pursued throughout these proceedings.

All parties understand that upon reorganization, ownership of all real and personal property of the several districts as well as all indebtedness and obligations of the several districts will become the responsibility of the new

district and the NCCPBE. All parties agree that in governing the new district, the NCCPBE must be empowered to negotiate employment contracts and deploy personnel as required to realize the goal of a racially nondiscriminatory school system. General recognition also prevails that the salaries set in existing individual employment contracts entered into between the several districts and their school employees should be honored. Therefore, subject to the terms of compensation of the existing contracts with individual employees the NCCPBE may transfer, reassign or terminate school employees as it deems fit.

The New Board also is granted broad latitude in matters of personnel, including the future setting of salaries. Teachers and staff presently employed under varying contracts with their respective districts will be negotiating in the future with one employer. In this connection, the issue whether staff salaries ought to be "levelled up" has again surfaced. This Court agrees with the three-judge court that previously declined to order "levelling up" * because employer-employee relations are uniquely the responsibility of the New Board. To provide maximum flexibility to the NCCPBE, 14 *Del. C.* §§ 1008-09, containing provisions with regard to salaries in a statutory reorganization, are expressly disavowed as controlling in this circumstance. Consequently, the NCCPBE may, within the financial constraints imposed, choose to operate at different salary levels or at a uniform rate with an adjustment upward or downward.

The State Board has agreed to continue its financial support for administrators under existing contracts for whom funding has been heretofore provided by the State. In accord with the position of the State Board, the NCCPBE has acknowledged that upon expiration of these

* 416 F. Supp. at 359.

contracts, the State's funding of these employees' contract should cease.

Other matters of cost allocation provoke disagreement between the State Board and the NCCPBE. Specifically, the NCCPBE has requested that provisions of the Delaware Budget Act requiring local districts to pay any increases in employees' fringe benefits after 1976 be disregarded for the forthcoming year. This proposal would result in the State assuming these entire costs for fiscal year 1978. The State Board objects to this proposal on grounds that such an exemption unduly favors Northern New Castle County over other districts within the State.

Finally, defendant State Board and the NCCPBE diverge on the issue of payment for ancillary relief, the State Board protesting the assessment of any remedial relief costs against the State.

The complexity of reorganizing into a single district and thereafter managing the unitary district in a fiscally sound manner necessitates some adjustment in the traditional allocation of financial responsibility. In 1976-77, the State contributed to the public schools in the desegregation area * $68,576,393 for current operating expenditures plus an unknown amount in other categories. During the transition period, in addition to shouldering its share of desegregation expenses, the State will be expected to continue to maintain a level of support to the desegregation area commensurate with its past funding practice. That level will be measured by the entire dollar support for the 1976-77 fiscal year or the current 1977-78 year, whichever is

* In addition to the $68,576,393, which includes salaries, operating expenses, and equalization funds, the state either pays in full or contributes to the following categories: minor capital improvements, major capital improvements, maintenance, transportation, non-public school transportation, voluntary transfer transportation, service to school district funds, educational contingency fund. Doc. 691.

higher.** So that all concerned can make an accurate assessment of State and local financial support for public education in the desegregation area, defendant Department of Public Instruction will be required to file by August 15, 1978 a comprehensive report detailing state contribution to education in the desegregation area in all categories for the current fiscal year and the 1976-77 fiscal year. Similarly, by the same date the NCCPBE will be required to file detailed financial information for the current fiscal year similar to that provided for the prior five years in NCCPBE Exh. 19.

The transition to a racially nondiscriminatory unitary school system entails increased costs,* notably in the area of ancillary relief. Joint funding of public education by state and local authorities is best accomplished under a cost allocation scheme that places responsibility with the local districts for normal operating expenses but which charges the bulk of transitional desegregation costs to the State for a limited period of time and on a declining scale. Initially, the NCCPBE, fortified by a dollar amount at least equal to the level of State support of the past or current year, whichever is higher,** is responsible for the salaries and the fringe benefits of the current staff and for any increases granted for the forthcoming year. To assess

** The State level of support has been increasing although student enrollment has been declining. *See* Chart 1.

* Reorganization also has the potential to generate savings. Economies of scale and a decrease in the number of administrators required to operate the school system provide two such possible cost benefits. Whether these savings are in fact realized will be determined by the NCCPBE.

** Fixing the minimum State level of support in terms of absolute dollars enables the State to escape the financial burden of inflation. A fixed rate also ignores the steadily upward trend of absolute dollar support by the State. The State must, however, treat the single district the same as all other districts and the specified level of support is a minimum which can be increased at the discretion of the state defendants.

these costs directly against the State would result in gratuitously burdening taxpayers who reside outside the desegregation area and resulting favoritism toward the desegregation area. Consequently, no exemption is created to Budget Act § 77(c). Second, the NCCPBE is also charged with paying its own operating costs after June 30, 1978.***

A number of other costs arise out of the order to desegregate and probably would not be incurred otherwise. In-service training, remedial education, and a counselling and guidance program are critical to effective desegregation. In recognition of that fact, the President of the NCCPBE has proposed that much of the last two weeks of the current school year be devoted largely to orientation and in-service training programs.* Among the virtues of this idea is cost efficiency, obtained because the essential staff are already on hand and on district payrolls. Accordingly, the New Board is authorized to schedule such training and orientation and to so notify the eleven districts; the course and direction of such orientation and in-service training will be the responsibility of the New Board. Expenses other than covered salary costs of personnel under contract to the individual districts for in-service training and orientation prior to June 30, 1978 shall be paid by the State. Should in-service training be required in excess of the two week period, subsequent to June 30, 1978 all such costs will be shared equally between the single district and State defendants, with the exception of covered salaries paid under individual contracts which shall be assumed by the NCCPBE.

In assessing costs against the State, the Court is aware that from the outset of this case the State Board of Educa-

*** Pursuant to Court order, the individual districts and the State Board will support financially the NCCPBE through June 30, 1978. Doc. 530.

* Doc. 6630, at 23-25 (Scarborough).

tion has claimed not to be a proper party to this action. But the three-judge court held "that to the extent that any schools in the state are in violation of *Brown* . . . the State Board must bear primary responsibility." 379 F. Supp. at 1222. The three-judge court further delineated the State Board's duty under *Brown* as requiring that it "'effectuate a transition to a racially nondiscriminatory school system'" and "eliminate from the public schools 'all vestiges of state-imposed segregation.'" *Id.* State action surrounding passage of the Educational Advancement Act in 1968 effectively stymied the mandate of *Brown II* by excluding Wilmington from any reorganization scheme. Further, after a ruling that the Educational Adavancement Act was unconstitutional, the State Board was ordered to devise an effective scheme to eliminate the dual school system. No responsive plan was forthcoming. Having failed over time to fulfill its constitutional obligation to provide a nondiscriminatory system of education for the children of this state, the State must now share the cost necessary to remedy the wrongs it perpetuated.

It is well settled that a state may be assessed for the costs of ancillary relief. *Milliken II, supra.* Despite a direct impact on a state treasury, a state may be ordered to make prospective payments to come into compliance with federal law. *See Edelman v. Jordan,* 415 U. S. 651 (1974).* The essence of *Milliken II* is that costs should be allocated between state and local officials in an equitable fashion, without overburdening either source. Because the tax rate to be set for the single district represents

* In the instant case, the State Treasurer, who controls the physical disbursements of funds, was added as a party defendant after the State temporarily delayed payment of court ordered expenses. Subsequently, a motion to dismiss the State Treasurer was filed. Although full cooperation is expected in the future, the motion to dismiss is considered premature at this time and is thus denied.

a substantial increase to most real property owners within the desegregation area, the Court deems it both impractical and inappropriate to assess any additional local costs at this time. Instead, mindful of the State's objection to continually paying for open-ended ancillary relief initiated by the NCCPBE, the Court has made an effort to balance competing state and local interests in a manner fairly and practically distributing the costs of desegregation.**

In the first year of desegregation, 1978-79, the salaries and fringe benefits of personnel hired by the NCCPBE or its successor as human relations specialists, counsellors, and teachers for remedial and compensatory education necessitated by desegregation, as determined by the NCCPBE or its successor will be entirely funded by the State defendants. As these positions are mandated by the desegregation decree and do not arise out of the normal operation of the schools, relevant provisions of the Budget Act shall not be deemed applicable until the opening of the school for the 1979-80 school year. During the 1978-79 school year, remedial and compensatory education programs as established by the NCCPBE will also be fully financed by the State as a cost of desegregation. During the second year of implementation the above costs will be shared equally by the State and the single district, and the Budget Act shall be deemed applicable to employees hired as a result of or diverted to desegregation work. In successive years, the State's contribution to desegregation costs incurred by the NCCBE each fiscal year will decline 10% per year until the 1985 fiscal year, whence its obligation for payment of any desegregation expenses will cease.

** A figure of 5% was added to the per pupil expenditure in arriving at the maximum tax rate that the New Board is empowered to set. This figure is only one-half that recommended by the State, Doc. 693, and is recognized as being inadequate to cover the costs of desegregation unless the allocation of costs set forth here is followed.

During this transition period, if for some unforeseen reason the State's level of dollar support drops below that of fiscal year 1976-77 or the current fiscal year, whichever is higher, the above schedule shall be modified and the difference assessed against the State defendants to assist the NCCBE in meeting the costs of ancillary relief.

As is currently the practice, and in accordance with State law, the State will be obligated to meet 100% of the cost of student transportation, plus all costs of additional extra-curricular activity buses necessitated by desegregation.*

Finally, although all efforts should be made to secure available federal funds, the prospect of such income is not intended either to alter the mandated cost allocation or to reduce the level of State support.

IV. FUTURE STATUS OF THIS LITIGATION

A. Continuing Jurisdiction

This Court will retain supervisory jurisdiction in accordance with *Evans v. Buchanan*, 281 F. 2d 385, 391 n. 1 (3d Cir. 1960), until the transition to a unitary school system is completely effectuated and the system is demonstrably operational over time. At that point, any party may move that this Court terminate its jurisdiction.

B. Survival of Component School Districts Pending Exhaustion of All Appeals

The component districts have requested that even after transfer of full authority to the NCCPBE, they all be kept in existence for the limited purpose of pursuing rights of appeal or judicial review. That the districts in some form should have the opportunity to pursue or respond to such appeals or judicial review is unquestioned. The

* Transportation expenses for handicapped students are excepted. *See* Doc. 691, at 3.

problem with granting the precise request, however, is that the NCCPBE would be responsible for the costs, fees, and charges incurred in connection with such appellate review proceedings.

Imposing upon the New Board the costs for eleven component districts is difficult because the nine predominantly white districts are in almost perfect, and perhaps perfect, alignment with respect to litigation stances. Further, until one reaches the question who pays for what costs, and perhaps even then, the predominantly white districts are in precise alignment with defendants State Board of Education and State Treasurer. Under this circumstance, and taking into account that already burdened real property taxpayers are the sole source of local income for the NCCPBE, the Court cannot justify saddling the NCCPBE with nine attorneys' fees to espouse the same position. Accordingly, the NCCPBE will be authorized to pay only the costs, fees, and charges of one counsel from the nine predominantly white districts who pursue an appeal or further judicial review. Because plaintiffs espouse an aligned position different from that of the nine predominantly white districts, the NCCPBE will also be authorized to pay the costs, fees, and charges of one counsel representing plaintiff, intervening plaintiff, and the NCCPBE minority member. Similarly, because the DeLaWarr District has maintained a different posture from all other parties throughout these proceedings, if it should choose to pursue appellate relief, its costs, fees and charges should be borne by the NCCPBE. Finally, although remaining in existence and therefore probably not in need of court authorization, the New Board is authorized to pay its own costs, fees, and charges in the event it determines to pursue and/or defend any position during appellate proceedings.

All costs, fees, charges, services, and obligations incurred prior to the full transfer of authority to the NCCPBE shall be borne by the respective districts and shall not become the obligation of the New Board. It is hoped the parties will cooperatively expedite all appeals and efforts to obtain judicial review so that all districts which choose to seek further appellate review can continue to have counsel of their own choice paid from their respective district coffers.

C. Successor to the NCCPBE

As of July 1, 1978, the NCCPBE shall become the New Castle County Board of Education ("NCCBE"). Hopefully, by that time the basic desegregation planning will have been accomplished and the NCCBE will be functioning as the operational school board of the unitary district.

CONCLUSION

It was noted early in this Opinion that a state court predecessor to the instant litigation was part and parcel of the landmark *Brown v. Board of Education* suit. At this point, the Court regards it worthwhile briefly to revisit the decision in *Brown II, supra.* In that case, the Supreme Court cited the "proximity to local conditions" of lower courts as a justification for remand. 349 U. S. at 299. Those lower courts were told to be guided by "equitable principles" and instructed that "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs". *Id.* at 300 (footnotes omitted). The Supreme Court emphasized "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them", *id.*, and empowered

the lower courts to "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." *Id.* at 300-01. Finally, the lower courts were directed to evaluate "the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." *Id.* at 301.

Over twenty-three years have elapsed since *Brown II* and the goal of nondiscriminatory public education in the desegregation area has not reached fruition. All the foregoing problems articulated by the Supreme Court, and more, have been at issue in this enduring litigation. The Court has looked for guidance to each of the equitable considerations enumerated by the Supreme Court, devoting particular attention to local needs and the importance of reconciling public and private interests. Now the promise of *Brown* is in sight; implementation is near and the constitutional infirmity that to children may "affect their hearts and minds in a way unlikely ever to be undone", *Brown I*, 347 U. S. at 494, will at last receive treatment. Schools and this riven community may devote their full attention to education rather than litigation.

Although the secondary remedial issues addressed in this Opinion are relatively few and narrow, they have been explored at length because their significance merits a full explication of the exercise of this Court's equitable power made necessary by a statutory void created by a longstanding legislative default. This Opinion shall constitute the findings of fact and conclusions of law of the Court pursuant to F. R. Civ. P. 52.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JANUARY 9, 1978

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 1816-1822

BRENDA EVANS, et al.,
Plaintiffs,

v.

MADELINE BUCHANAN, et al.,
Defendants.

ORDER

NOW TO-WIT, This 9th day of January, 1978, the Court having conducted hearings on the Report of the New Castle County Planning Board of Education (the "Board") upon its Plan For Operation of a Unitary School System (the "Report") submitted by the Board pursuant to the Court's Order of August 5, 1977; and the Court having considered the Report and pupil reassignment plan included as a portion of the Report of the Board, Plan W submitted by Mr. Wendell Howell and plans prepared by the Pupil Assignment Committee of the Board and presented to the Court at hearings commencing on November 29, 1977; and the Court having considered the briefs and arguments of counsel for the parties and the Board and issued its Opinion of January 9, 1978, for the reasons set forth in the Opinion, it is

ORDERED That:

A. GOVERNANCE

In conformity with the prior orders of this Court and the May 18, 1977 mandate of the Third Circuit Court of Appeals, there shall be a single school district (the "New District") comprised of the present Alfred I. duPont, Alexis I. duPont, Claymont, Conrad, DeLaWarr, Marshallton-McKean, Mount Pleasant, New Castle-Gunning Bedford, Newark, Stanton and Wilmington school districts (the "Component Districts"), which shall be governed by the Board having the powers and duties provided for by this Order and the prior orders of this Court, including but not limited to the following:

1. *Delaware Law*

The provisions of Delaware Law shall apply to the New District and the Board except as such provisions may be modified by Attachment Number 1 to this Order and paragraphs 2-10, inclusive, of this Part A. The Board shall be deemed a "school board" as such term is employed in Title 14 of the Delaware Code. The New District shall be deemed a reorganized school district as though consolidated by referendum pursuant to 14 Del. C. § 1027, except that the language "This section shall apply only with respect to reorganized school districts constituted and established in accordance with this chapter" shall be deemed to be deleted.

2. *Properties, Indebtedness and Obligations of Former School Districts*

Upon the transfer of full authority to the New District all real and personal property of the Component Districts comprising the New District shall become the property of and become vested in the New District; and all indebtedness and obligations of the Component Districts (excluding such obligations, if any, contained in any collective bargaining agreements) shall become the indebtedness and obligations of the New District. All rights of creditors against any of the Component Districts shall be preserved against the New District. All indebtedness and obligations owed to any of the Component Districts, and all indebtedness obligations and taxes owing to or for the account or accounts of the Component Districts, uncollected in the Component Districts, and all moneys deposited to or for the account or accounts of the Component Districts shall be paid to or for, as the case may be, the account or accounts of the New District.

3. *Deployment of School Employees in the New District; Transfer of Certified School Employees; Salary Upon Transfer or Reassignment; Effect*

Upon the transfer of full authority to the New District:

(a) All school employees of the Component Districts shall be deployed throughout the New District according to the staffing plan of the New District which is in force at the time the New District assumes full authority for the operation of the schools in the area, subject, however, to such modifications of the staffing plan as the Board may thereafter prescribe including adherence to paragraph (C)(8) of this Order.

(b) In the event of the necessary transfer or reassignment of any school employee, who is certified under state law in any of the Component Districts to a position in the New District for which such employee is not qualified for certification by the State Board of Education or other certifying authority, as the case may be, such school employee so reassigned shall remain in a fully certified status for so long as he or she holds any assigned position in the New District.

(c) Nothing in this Order shall be deemed to alter or affect in any way either the provisions of Chapter 14 of Title 14 of the Delaware Code or the right to terminate the employment of any school employee, to whom the provisions of Chapter 14 of Title 14 of the Delaware Code do not apply, for cause or for any other reason not inconsistent with the purpose of this Order, except that, for purposes of Section 1403 of that Title, such employee shall be deemed employed by the school board of the New District for the period of time such teacher was employed by the school board of the component former school district which employed such teacher at the time the New District was established.

(d) No person continuing in the employment of the New District under a contract entered into between such person and any of the Component Districts pursuant to 14 Del. C. § 1329(b) shall be entitled to continue in the employment of the New District following the expiration of the contract term at the same level of compensation specified by the contract, any provisions of Delaware Code, Title 14 to the contrary notwithstanding.

4. *Rate of Tax; Obligations of the New District*

(a) The School Board of the New District may, without election or referendum, in addition to the amounts apportioned or otherwise paid to it by the State Board of Education, or appropriated to it by the General Assembly, or otherwise paid to it by the State Treasurer, establish, levy and collect additional taxes for current operating expenditures upon the assessed value of real estate in such district up to a maximum authorized rate of $1.91 per $100 of assessed valuation

plus up to a maximum authorized rate of $.05 per $100 of assessed valuation for tuition pursuant to 14 Del. C. Chapter 6 and up to $.03 per $100 of assessed valuation for minor capital improvements. The levy of any tax for current operating expenses in excess of the maximum authorization shall in all respects be subject to the provisions of Title 14 Del. C., Chapter 19, Subchapter I.

(b) The maximum authorization set forth in subparagraph (a) shall be a continuing authorization and shall not be lost if not used.

(c) All obligations of any of the Component Districts evidenced by bonds, serial or otherwise, if any, shall become the common obligation of all the residents of the New District or its successors and the principal and interest on the outstanding bonds shall be paid according to the original terms for principal and interest by means of a common tax levied uniformly throughout the New District except that for the fiscal year commencing July 1, 1978 said tax shall be $0.24 per $100 of assessed valuation.

(d) All bonds issued or portions thereof, approved by the voters of a component former school district or districts prior to July 1, 1978 and remaining unissued on July 1, 1978 may be issued by the New District and such bonds shall become the common obligation of all the residents of the New District and the principal and interest on such bonds shall be paid by means of a common tax levied uniformly throughout the New District.

(e) All obligations evidenced by bonds issued by the New District shall become the common obliga-

tion of the residents of the New District, and the principal and interest on the outstanding bonds shall be paid according to the original terms for principal and interest by means of a common tax levied uniformly throughout the New District.

(f) The NCCPBE shall establish a uniform local school tax rate covering current operating expenditures, tuition, debt service and minor capital improvements no later than February 24, 1978 for the fiscal year commencing July 1, 1978; February 24, 1979 for the fiscal year commencing July 1, 1979; and May 25, 1980 for the fiscal year commencing July 1, 1980 and succeeding fiscal years.

(g) For purposes of 14 Del. C. § 1914, the taxes to the maximum authorization established in paragraph 4 of this Order shall be considered as having been originally authorized by an election in the New District.

5. *School Board of the New District*

(a) The New District shall be governed by a five person board which until June 30, 1978 shall be known as the New Castle County Planning Board of Education (NCCPBE) and after July 1, 1978 shall be known as the New Castle County Board of Education.

(b) The membership composition of the present NCCPBE shall become the individual members of the New Castle County Board of Education, all of whom shall serve in that capacity and under the organizational structure of the NCCPBE which obtains on the date of this Order until June 30, 1980.

(c) Any vacancy which occurs on the NCCPBE or the New Castle County Board of Education between the date of this Order and June 30, 1980 shall be filled by appointment by the State Board of Education.

(d) No later than the last day of February, 1980 the New Castle County Board of Education shall designate a date for an election to be annually held in May to fill the vacancy caused by the expiration of the term of one member of the New Castle County Board of Education as determined by lot in accordance with paragraph 5(e) of this Order. The term of office of an individual elected to the New Castle County Board of Education shall be five years.

(e) At a regularly scheduled meeting of the New Castle Board of Education held no later than January 31, 1980, the State Board of Education acting through its designee shall by lot determine the initial terms of office of the then present membership of the New Castle County Board of Education, causing one member's term to expire on June 30, 1980 and one of the remaining terms to expire on June 30 in each of the four succeeding years.

(f) The New Castle County Board of Education at the end of the transition from an appointed body to an elected group shall consist of one representative from the City of Wilmington and one representative from each of the four attendance areas excluding that portion of an attendance area which includes the City of Wilmington.

(g) The State Board of Education shall assure that each outgoing member of the New Castle County Board of Education is succeeded by a member from the attendance area conforming geographically as

closely as possible to the area represented by the outgoing member.

(h) A person shall not be qualified for election to the New Castle County Board of Education or to vote for such person unless he or she is a citizen of the State of Delaware, a resident of the area to be represented, and qualified to vote at a school election of the New District at the time of such election.

(i) The conduct and responsibility for school board elections for the New District or the filling of any vacancy shall insofar as is feasible follow state law.

(j) The component districts shall not hold elections in 1978 or 1979 under 14 Del. C. § 1405, nor shall they hold school board elections.

6. *Transitional Powers of the New District*

Pending the transfer of full authority from the Component Districts to the New District, the New District:

(a) Shall have the exclusive authority to approve both the employment of administrative staff personnel for whom five year contract terms are authorized under 14 Del. C. § 1329(b) and the extension or modification of employment contracts for existing staff personnel, employed or to be employed by any of the component school districts.

(b) May request of and the Component Districts shall supply to the District a list and copies, if requested, of existing contracts between them and such administrative staff personnel, and

(c) May enter into employment contracts for terms not to exceed five years, with key administrative staff personnel for the following positions:

(1) Superintendent of Schools;

(2) Administrative Assistant to the Superintendent of Schools;

(3) Deputy Superintendents for Instructional Services, Administrative Services and Area Administration, and

(4) Attendance Area Superintendents.

(d) May direct each of the Component Districts, before May 1, 1978, to notify the number of teachers by category who are not to be reemployed. In the event that the Board directs any or all of the Component Districts to dismiss teachers pursuant to this paragraph 6(d), any district so directed shall remain in existence until September 1, 1978, for the purpose of conducting and shall be empowered to conduct any hearings, defend any appeals and to carry out any other duties and responsibilities necessary to accomplish the directive of the Board. Any board of education so directed shall be vested with all powers formerly held by it in order to comply with the directive of the Board. Any procedures employed in the release of said teachers shall be in accordance with Delaware law and the appropriate collective bargaining agreement between the component local districts and the local teachers' bargaining unit for the present 1977-78 school year. Any costs, fees or charges incurred and payable following the transfer of full authority to the Board, which would normally

have been paid by any of the Component Districts in this process, shall be paid by the Board.

(e) May employ new employees and direct any of the Component Districts to recall any employee to whom notice of termination has been given.

7. The Board is authorized to implement the items set forth in the State Board of Education Timetable for Transfer of Full Authority to the New Castle County Planning Board of Education, Part III, appearing as pages 28 and 29 of Document #605. The State Board of Education and the Component Districts are directed to fully cooperate with the Board in implementation of the timetable.

8. The State Treasurer is directed to provide funding pursuant to 14 Del. C., Chapter 13, to the Board with respect to administrative staff personnel employed by the Board and for whom employment contracts are authorized under 14 Del. C. § 1329(b) in an amount which, in the aggregate, is not less than the level of funding provided to all of the Component Districts for such personnel immediately prior to the transfer of full authority to the Board and irrespective of any decline in enrollment. Upon the conclusion of the present term of any such contract, funding hereunder shall be reduced by the amount of State funding applicable to the contract, and upon the conclusion of the present terms of all such contracts, the obligations of the State Treasurer under this paragraph 8 shall cease.

9. Full authority shall be transferred to the Board on July 1, 1978 or such earlier date as may be established by the State Board of Education and approved by the Board.

10. The parties and the Board shall take all steps necessary to comply fully with the Court's Order of November 8, 1977.

B. PUPIL ASSIGNMENT

1. The Board and its successor is authorized and empowered to implement commencing September, 1978, a pupil assignment plan which reassigns all students from the geographic area of the predominantly black districts (Wilmington and DeLaWarr) to the geographic area of the predominantly white districts (Alfred I. duPont, Alexis I. duPont, Claymont, Conrad, Marshallton-McKean, Mount Pleasant, New Castle-Gunning Bedford, Newark and Stanton) for nine years and all students from the geographic area of the predominantly white districts to the predominantly black districts for three consecutive years (9-3).

2. The 9-3 pupil assignment plan as implemented shall contain a full 1-12 grade span within the City of Wilmington and at a minimum shall utilize one of the three high schools of the predominantly black districts as a 10-12 grade center.

3. The 9-3 pupil assignment plan as implemented shall include within it the Student Assignment Plan for Wilmington's Hispanic Population Eligible for Bilingual Education (NCCPBE Exh. 1A).

4. In the implementation of the 9-3 pupil assignment plan, the Board and its successor is authorized to:

(a) Assign students who will enter grade 12 in the 1978-79 academic year to schools other than those which such students attended in the 1977-78 academic year;

(b) Assign voluntary transfer students to schools other than those which such students attended in the 1977-78 academic year;

(c) Exempt the following:

(1) Children attending kindergarten.

(2) Subject to the requirements of State and Federal law, students presently attending and who in the future may attend the Bush, Douglass, Leach, Meadowood, Opportunity, Shortlidge (orthopedic wing only), Sterck and Wallin special education school facilities and such other similar special school facilities as presently exist or may be hereafter established in the New District.

(3) Students who attend Howard Career Center and Hodgson Vo-Tech schools during the 1978-79 academic year.

5. The New Castle County Vocational Technical High School is to be considered exempt from this decree.

C. Relief Ancillary to Pupil Assignment Plan

The Board shall implement the following programs in connection with the desegregation plan:

1. *In-Service Training*

Administrators, faculty and other staff require orientation and training for desegregation. Therefore, the Board shall formulate and implement a comprehensive in-service training program for teachers, administrators and other staff in order to train personnel to cope with the desegregation process.

2. *Reading and Communication Skills*

The Board shall institute an affirmative reading and communication skills program, which does not resegregate the pupils, in order to remedy the effects of the past discrimination.

3. *Curriculum*

The Board shall provide curriculum offerings and programs which emphasize and reflect the cultural pluralism of the students, and all instructional materials, texts and other curriculum aids shall be free of racial bias.

4. *Counseling and Guidance*

To ameliorate the pressures on students undergoing desegregation and to prevent resegregation under the guise of curriculum or program choices, the Board shall institute an effective and nondiscriminatory counseling and guidance program. This counseling and guidance program must insure that students are counseled on a racially nondiscriminatory basis concerning all programs available in the area of work opportunities and opportunities for a college education; and that the students who choose the vocational and other special public schools in the area do so on a nondiscriminatory, and non-segregated basis.

5. *School Building Construction, Site Selection and Use of Existing Schools*

Selection of school sites, construction of new buildings, expansion of existing buildings, and closing of school buildings have an important bearing on the future status of desegregation in this area. The Board shall establish and enforce nondiscriminatory guidelines for new construction, review of building needs and the appropriateness of each proposed building project or school closing.

6. *Recognition of Human Values*

In order to protect the individual dignity of students and teachers and to prevent racial myths and sterotypes

from prevailing in schools undergoing desegregation, the Board shall provide an appropriate human relations program throughout the unitary school system.

7. *Standards of Conduct*

The Board shall develop as part of its Board policies a code of rights and responsibilites regarding such issues as student conduct and suspension and expulsion. This code shall provide for racially nondiscriminatory discipline and shall contain provisions to insure each student in the desegregation area procedural and substantive due process required by existing law. Such a code will help to provide equal educational opportunity to all students by protecting them from unreasonable, discriminatory, and arbitrary rules; and the Board shall not administer the code on a racially selective or otherwise biased basis.

8. *Staff*

The Board shall reassign faculty, administrative and other staff personnel to insure that schools do not retain their former racial identity through racially identifiable faculty and staff assignments.

D. Allocation of Costs

1. On or before August 15, 1978, defendant, Department of Public Instruction shall file a detailed comprehensive report of financial support to the Component Districts of the desegregation area for the current fiscal year and the preceding fiscal year broken down by category of support as set forth in Document No. 691.

2. On or before August 15, 1978, the New Castle County Board of Education (NCCBE) shall file detailed

financial information for the current fiscal year similar to that provided for the prior five years in NCCPBE Exh. 19.

3. Section 77(c) of the Budget Act is applicable to the New District; the New District shall be considered a school district succeeding to the position of the Component Districts for purposes of Section 77(b) of the Budget Act.

4. The NCCPBE or its successor shall isolate and identify all dollars costs of desegregation and shall share that information with the State Board of Education.

5. For the fiscal year commencing July 1, 1978, the salaries and fringe benefits of personnel hired by the NCCPBE, its successor, or Component Districts under the express direction of the NCCPBE or its successors, as human relations specialists, counselors and teachers for remedial and compensatory education necessitated by the desegregation process shall be paid in their entirety by the state defendants; for the fiscal year commencing July 1, 1979, the above costs for that fiscal year shall be divided and paid equally between the state defendants and the New Board; in each of the five successive years the state defendants' contribution of the total cost incurred per fiscal year shall be reduced at the rate of ten percent. If the state defendants' level of dollar support to public education in the desegregation area should decrease below that of the current fiscal year or the preceding fiscal year, whichever is higher, the schedule contained above shall be modified and the state defendants shall pay the difference in dollar support to the New District to assist in meeting the continuing costs of ancillary relief.

6. All costs of additional extracurricular activity transportation necessitated by desegregation shall be paid by the state defendants.

7. The NCCPBE and its successor is authorized to schedule such in-service training programs and orientation programs for children, their parents and teachers at such times including during the current school year, for such duration and as often as is required to aid the desegregation process. To the extent such programs are conducted during the current school year the Component Districts shall cooperate and shall be responsible for salaries of personnel covered by their existing contracts. The state defendants shall pay all other costs of said programs. The salary costs of all such programs to be conducted subsequent to June 30, 1978, as deemed necessary by the New Castle County Board of Education, shall be divided equally between the New District and the State defendants except that the New District shall be responsible for covered salaries of persons under contract to the New District or Component Districts.

E. Survival of Component School Districts Pending Appeals

Upon the transfer of full authority to the NCCPBE or its successor, the New Castle County Board of Education, the power and authority presently vested in the present Boards of Educations of the Component Districts shall (except to the extent otherwise provided in this Order) cease to exist except for the power and authority of each Component District to pursue and defend whatever rights of appeal or judicial review said Component Districts or any of them may have with respect to the issues determined by this Court in this Order. Upon the exhaustion or abandonment of such rights of appeal or judicial review and defense of the same, all power and authority of said Boards of Education shall terminate and the Boards of Education of the Component Districts shall be dissolved.

Pending the completion of said appellate or judicial review proceedings, the members of the Boards of Education of the Component Districts serving as of the date of the transfer of full authority to the New Castle County Planning Board of Education shall continue to serve as members of said Boards of Education for the purposes set forth in this Order. The costs, fees or charges incurred subsequent to transfer of full authority in connection with such appellate or final review proceedings shall be paid by the New Castle County Board of Education provided, however, it shall pay only the costs, fees or charges of one counsel for the predominantly white districts, one counsel for plaintiffs, one counsel for DeLeWarr and the costs, fees and charges of its own counsel.

F. Retention of Jurisdiction

Jurisdiction is retained until the transition to a racially nondiscriminatory unitary school system is effectuated and the system is operational.

ATTACHMENT NUMBER 1

A. 14 Del. C., Chapter 10

The provisions of 14 Del. C., Chapter 10, are limited on their terms to the reorganization that took place under the Educational Advancement Act. *See* 14 Del. C. § 1002, 1004. Therefore, Chapter 10 is inapplicable to the desegregation area and its governance. However, unless deleted below, or inconsistent with this Order and the accompanying January 1978 Opinion, the provisions of Chapter 10 of 14 Del. C. shall serve as guidance for the NCCPBE and its successor. 14 Del. C., Chapter 10, is amended in the following ways:

1. The provisions of Title 14, Delaware Code § 1004 and § 1051, to the extent they refer to §§ 1061, 1062 or 1063, shall not apply to the New District.

2. *Deleting* the words "in accordance with the provisions of this chapter" in § 1002(2) and § 1002(3).

3. *Deleting* 14 Del. C. § 1004(c)(4).

4. *Deleting* 14 Del. C. § 1008.

5. *Deleting* 14 Del. C. § 1009.

6. *Deleting* 14 Del. C. § 1010.

7. *Deleting* the words "except the reorganized district of the City of Wilmington, the boundaries of which shall at all times be the same as the boundaries of the City of Wilmington" appearing in 14 Del. C. § 1026(a).

8. *Deleting* the words "Where any provision of this section is inconsistent with the provisions of Chapter 92, Volume 23, Laws of Delaware, as amended, relating to the school district of the City of Wilmington and the Board of Public Education in Wilmington, Chapter 92, Volume 23, Laws of Delaware, as amended, shall control," appearing in 14 Del. C. § 1047.

9. *Deleting* the words "not applicable to school district of the City of Wilmington" in the heading of § 1057, and subsection (b) of 14 Del. C. § 1057.

10. *Deleting* 14 Del. C. § 1061.

11. *Deleting* 14 Del. C. § 1062.

12. *Deleting* 14 Del. C. § 1063.

9. *Deleting* the words "of the board", "board", "to the board" and "before the board" in § 1414.

10. *Deleting* the words "and to the Board of Education of the School District of the City of Wilmington," appearing in 14 Del. C. § 1501.

11. *Deleting* the words "and the school district of the City of Wilmington," appearing in 14 Del. C. § 1901(1).

12. *Deleting* the words "and the Board of Education of the school district of the City of Wilmington," appearing in 14 Del. C. § 1901(2).

13. *Deleting* the last sentence reading "in the case of the school district of the City of Wilmington, such tax as is necessary to support its local district contribution may be levied, notwithstanding the maximum tax rate specified in section 11, Chapter 92, Volume 23, Laws of Delaware, as amended by Chapter 9, Volume 56, Laws of Delaware, and, unless otherwise specifically provided, such tax rate as may be so specified on or after June 3, 1968," appearing in 14 Del. C. § 1902(b).

14. *Deleting* the words "if the building or equipment is located in a school district outside of the City of Wilmington, or the Board of Public Education in Wilmington, if the building or equipment is located in the consolidated school district in the City of Wilmington," appearing in 14 Del. C. § 3701.

15. *Deleting* the words "or the Board of Public Education in Wilmington as provided in section 3701 of this title," appearing in 14 Del. C. § 3702.

16. *Deleting* the words "or to the Board of Public Education in Wilmington, whichever board is concerned in the particular instance," appearing in 14 Del. C. § 3703.

17. *Deleting* the words "outside of the City of Wilmington," and by adding the word "all" before the words "school districts" in that same line, appearing in 14 Del. C. § 3704.

18. *Deleting* 14 Del. C. § 3705 in its entirety.

19. *Deleting* the words "outside of the City of Wilmington," and by striking the word "the" before the words "school districts" and replacing it with the word "all", appearing in 14 Del. C. § 3706(a).

20. *Deleting* the words "and the Board of Public Education in Wilmington," appearing in 14 Del. C. § 3707.

B. 14 DEL. C., GENERALLY

Any provision of 14 Del. C. inconsistent with any provision of this Order or the accompanying January 1978 Opinion shall, to the extent inconsistent, be inapplicable to the New District and its governance. A non-exhaustive list of those provisions which shall be deemed deleted from Title 14 or modified with respect to their application to the New District is set forth as follows:

1. *Deleting* all references to the separate school districts or school boards in the City of Wilmington or in any of the districts north of the northerly line of the Appoquinimink School District.

2. *Deleting* 14 Del. C. § 603(c) and § 603(e).

3. *Deleting* the words "or the school district of the City of Wilmington," appearing in 14 Del. C. § 1301(1).

4. *Deleting* the words "the school district of the City of Wilmington," appearing in 14 Del. C. § 1302.

5. *Deleting* the words "not to exceed a total of two per reorganized school district" from § 1321(e)(1).

6. *Deleting* the words "not to exceed a total of six per reorganized school district" from § 1321(e)(2).

7. *Deleting* the words "or more" in § 1321(e)(9).

8. Modifying § 1321(e)(10) by adding the words "per five hundred full state units of pupils" after the words "1 such supervisor" and prior to the words "in any district."

9. *Deleting* the words "before a board" in § 1403(a).

10. *Deleting* the words: "by the terminating board"; "within 21 days after the date of receipt of said written request"; "shall be conducted by a majority of the members of the board and"; "before the board"; "by the board"; and "of the board" in § 1413.

C. BUDGET ACT

1. The provisions of 61 Del. L., Chapter 116 (the Budget Act), Sections 77(b) and (c), shall not be deemed applicable to employees whose positions are created pursuant to this order until the fiscal year commencing July 1, 1979.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JANUARY 20, 1978

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 1816-1822

BRENDA EVANS, et al.,
Plaintiffs,

v.

MADELINE BUCHANAN, et al.,
Defendants.

Joseph A. Rosenthal, Esq., and Irving Morris, Esq., of the law firm of Morris and Rosenthal, Wilmington, Delaware; and Louis L. Redding, Esq., Wilmington, Delaware, for individual plaintiffs.

Richard Allen Paul, Esq., of the law firm of Paul, Lukoff & Hurley, Wilmington, Delaware; Of Counsel, Louis R. Lucas, Esq., Ratner, Sugarmon, Lucas, Salky & Henderson, Memphis, Tennessee; Paul R. Dimond, Esq., of the law firm of O'Brien, Moran & Dimond, Ann Arbor, Michigan; William L. Taylor, Esq., Center for National Policy Review, Washington, D. C., for intervening plaintiffs.

Aida Waserstein, Esq., Wilmington, Delaware, for intervening Hispanic plaintiffs.

Hon. Richard R. Wier, Jr., Attorney General, State of Delaware, and Regina M. Small, Esq., Assistant Attorney General, State of Delaware; William Prickett, Esq., and Mason E. Turner, Esq., of the law firm of Prickett, Ward, Burt & Sanders, Wilmington, Delaware; Philip B. Kurland, Esq., Chicago, Ill., for defendant State Board of Education.

Edward W. Cooch, Jr., Esq., of the law firm of Cooch & Taylor, Wilmington, Delaware, for Marshallton-McKean School District.

Samuel R. Russell, Esq., of the law firm of Biggs & Battaglia, Wilmington , Delaware, for Alexis I. duPont School District.

William Poole, Esq., of the law firm of Potter, Anderson, & Corroon, Wilmington, Delaware, for Alfred I. duPont School District.

James T. McKinstry, Esq., of the law firm of Richards, Layton & Finger, Wilmington, Delaware, for Claymont and Stanton School Districts.

John P. Sinclair, Esq., of the law firm of Potter, Anderson & Corroon, Wilmington, Delaware, for Newark School District.

Jerome O. Herlihy, Esq., of the law firm of Herlihy & Herlihy, Wilmington, Delaware, for Conrad Area School District.

Howard M. Handelman, Esq., and Jeffrey M. Weiner, Esq., of the law firm of Bayard, Brill & Handelman, Wilmington, Delaware, for New Castle County Vocational-Technical School District.

James M. Tunnell, Jr., Esq., and Richard Allen, Esq., of the law firm of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for Mount Pleasant School District.

David Anderson, Esq., of the law firm of Potter, Anderson & Corroon, Wilmington, Delaware, for New Castle-Gunning Bedford School District.

Thomas S. Lodge, Esq., of the law firm of Connolly, Bove & Lodge, Wilmington, Delaware, for DeLaWarr School District.

Sheldon N. Sandler, Esq., of the law firm of Bader, Dorsey & Kreshtool, amicus curiae, Delaware State Education Association.

Clifford B. Hearn, Esq., of the law firm of Balick & Hearn, P. A., Wilmington, Delaware, amicus curiae, Wilmington Federation of Teachers AFT AFL-CIO.

Henry N. Herndon, Esq., and Edward M. McNally, Esq., of the law firm of Morris, James, Hitchens & Williams, Wilmington, Delaware, for New Castle County Planning Board of Education, a non-aligned party.

Leonard L. Williams, Esq., and George E. Evans, Esq., Wilmington, Delaware, for Wendell Howell, member of New Castle County Planning Board of Education.

OPINION

Wilmington, Delaware
January 20, 1978.

SCHWARTZ, *District Judge.*

The New Castle County Planning Board of Education ("NCCPBE" or "New Board") has moved for modification and clarification of the January 9, 1978 Opinion and Order of this Court in the above-captioned case.* Limited further guidance has been requested with respect to five

* Doc. 702. Additionally, Hispanic plaintiffs have requested an amendment to paragraph B(3) of the Order to assure that the NCCPBE has the power to house a bilingual program for grades 10-12 in a Wilmington high school that is utilized as a 10-12 grade center. Doc. 704. The Court has perused the relevant exhibit referenced in paragraph B(3) of its Order and has concluded that nothing in the exhibit prevents the NCCPBE from assigning Hispanic students to a 10-12 grade center located in Wilmington. Accordingly, the motion of Hispanic plaintiffs is denied.

areas: (1) Governance—Part A. 1 of the Order; (2) Pupil Assignment—Students attending the Howard Career Center and Hodgson Vo-Tech schools; (3) Taxation for Tuition and Minor Capital Improvements; (4) Tax Rate for Current Expenses; and (5) Allocation of Costs. After examination of the NCCPBE's letter memorandum in support of its motion,** and upon consideration of the contentions advanced in oral argument on January 20, 1978, the following determinations are made.

(1) GOVERNANCE—PART A. 1 OF THE ORDER

The NCCPBE has expressed concern that Part A. 1 of the Order may be undermined by Attachment Number 1 to the Order, Part A, first unnumbered paragraph. In this regard, the NCCPBE has noted its "understanding" that the latter terminology is "not intended to obviate" the former, "that the provisions of [14 Del. C.] Chapter 10 with the amendments noted in Attachment Number 1 shall apply, and that there is no discrimination of the [New] Board's authority to act as a school board under Delaware law and that it is deemed such for all purposes, including the exercise of the powers of taxation provided for by the Order." * Because the Court concurs with this explication and believes that no workable alternative explanation of the interaction of the specified provisions exists, clarification is supplied and the request for modification is denied.

(2) PUPIL ASSIGNMENT—STUDENTS ATTENDING THE HOWARD CENTER AND HODGSON VO-TECH SCHOOLS.

Concern has been expressed that the authority granted the NCCPBE by the Court with respect to students at Howard and Hodgson differs from that requested. The

** Doc. 703.
* *Id.* 2.

NCCPBE desires to assure that students who attend these schools during the 1977-78 academic year are permitted to complete their three year high school vocational courses without being reassigned.* The phraseology employed by the Court in its Order and Opinion clearly facilitates this purpose for the 1978-79 academic year. With respect to the further year that one group of students must not be reassigned in order to enable them to complete their three year vocational programs, the Court regards this specific situation as an administrative prerogative of the NCCPBE which can be accomplished without an amended Order. It is noted in this regard that no party to this action has objected to the NCCPBE's proposed assignment pattern for these affected students. Accordingly, the requested formal modification is denied as unnecessary.

(3) Taxation for Tuition and Minor Capital Improvements.

The court set a maximum tax rate for tuition at $.05 per $100 assessed valuation and $.03 for minor capital expenditures and invited a motion by the NCCPBE if it desired a broader authorization for those items in fiscal years subsequent to 1978. Citing the increased cost of transportation to specialized schools paid out of local tuition revenues, the NCCPBE has moved to obtain relief from the $.05 ceiling on the tuition tax. The New Board also posits that the $.03 tax rate sufficient in the past to fund minor capital expenditures may well be insufficient in the future and seeks to be released from it. The New Board points out that a check and balance system is operative by virtue of statutory provisions prohibiting indiscriminate spending from these accounts. So limited, the NCCPBE concludes that setting a maximum rate for tuition and minor capital expenditures is unduly restrictive.

* *Id.* 3.

Having placed broad authority in the NCCPBE, the Court will permit the New Board to set the tax rates for tuition and minor capital improvements in future years. Because, however, the NCCPBE has not demonstrated that the present rates are currently inadequate and there is an advantage to having a fixed maximum tax authorization in the first year of reorganization, the rates of $.05 and $.03 shall be effective as maximums for the fiscal year commencing July 1, 1978. Thereafter, as is the case with debt service, the rates for tuition and minor capital improvements shall be determined by the New Board.

(4) Tax Rate for Current Expenses

In the area of taxation, the NCCPE also has brought to the attention of the Court information that current expense data previously supplied by the NCCPBE and utilized by the Court in arriving at a maximum authorization for current operating expenses may not be wholly accurate. Stating that although "the result of the process employed by the Court is, in our view, substantially correct," * the NCCPBE points out that "disbursements incident to the operation of cafeterias" and inclusion of tuition tax receipts create a distorted financial picture for the Mount Pleasant district because these expenses are self-generated or funded from sources other than the current operating budget. As a result, the NCCPBE notes current expenditures are overstated in NCCPBE Exh. 19 and consequently the maximum tax rate authorization established in reliance on that exhibit may be higher than would otherwise result.

Issuing a caveat, however, the NCCPBE declares "there is lacking sufficient precise data to determine the impact of this item of expenditure upon the aggregate ex-

* *Id.* 6.

penditures reflected in Exhibit 19." ** By subsequent affidavit *** filed on January 19, 1978, the NCCPBE has indicated that removal of impure data from NCCPBE Exh. 19 leads when employing the methodology of the Court to an eleven district average authorized tax rate of $1.85 and a Mount Pleasant rate of $1.74. More importantly, the affidavit demonstrates that Alfred I. duPont passed Mount Pleasant as the district with the highest per pupil expenditure for the 1976-77 tax year * and that incorporating the Alfred I. district's per pupil extrapolation for the current school year with the Court's methodology results in a $1.89 maximum authorized current operating expense tax rate.**

The NCCPBE has candidly indicated that the maximum tax rate for current operating expenses authorized by the Court is higher than would result for another reason. In arriving at a maximum tax rate authorization of $1.91, the Court multiplied the per pupil expenditure by the figure 72,590 students reported by the Department of Public Instruction as within the desegregation area.*** Excluding the New Castle County Vo-Tech students who are independently funded, a fact in evidence, reduces the enrollment to 70,933. Further reducing the enrollment figures by eight students mistakenly included by two dis-

** *Id.* 7.

*** Doc. 705.

* *See* Evans v. Buchanan, — F. Supp. — (D. Del. 1977), January 9, 1978 slip op. at 111 n. *.

** The Court makes no findings of fact based on the affidavit (Doc. 705) because the data within it has not been admitted into evidence. Nonetheless, comfort is taken from the strong indication that applying requisite extrapolation to the Court's methodology results in an error apparent at this point in time of only $.02, or about one percent.

*** D. P. I. Exh. 4.

tricts **** and applying the formula set out in the Opinion at Chart 5 results in a tax rate authorization of $1.87—4 cents less than that approved by the Court.

Were the Court actually setting a tax rate, the new data would be of marked significance. But for reasons previously stated,* the Court's participation has been far less intrusive. Relying on the most current data available,** the Court undertook to establish a maximum current operating tax rate authorization to be placed in the New Board and explained its methodology in exacting detail. Because every effort was made to follow the basic precepts of state law, and that law requires as a starting point the highest per pupil expenditure for the current school year, for which data is not available,*** that methodology necessarily employed extrapolation based upon historical financial fact. As a consequence, the resultant tax authorization reflects a maximum number which is appropriate, but requisite use of extrapolation necessarily results in a probability of being less than 100% accurate. The 4-cent difference resulting from the unfortunate inclusion of the Vo-Tech students in calculations introduces only a two percent error which is well within an acceptable range. Because the NCCPBE is charged with setting the rate and because it is expected that the initial rate will be set significantly below the maximum authorization, there is very little to be gained by recomputing the various calculations and a great deal to be said against it. Whereas the enrollment of New Castle County Vo-Tech is a matter of record, the over-statement of the eight students is indicative of the kind of adjustment the

**** Total student enrollment in the desegregation area for per pupil expenditure purposes is 70,941, according to Doc. 705.

* *Evans, supra,* slip op. at 101.

** *Id.* at 108; *see* Doc. 691.

*** *Evans, supra,* slip op. at 108.

Court would have to consider every time a reporting body discovered inadvertent errors or data was otherwise changed.* Because the Court is not establishing the tax rate, these matters are better directed to the attention of the NCCPBE. Consequently, the Court declines to embark on a course of recomputation or changing upward or downward the established tax authorization for the current operating expense component of the local school tax rate.

(5) Allocation of Costs

Finally, the Board has sought clarification of the cost allocation scheme, particularly with regard to salary costs for in-service training. The Opinion contemplates and the Order so provides that if in-service training were scheduled after June 30, 1978, the salaries of teachers and staff would be shared equally between the single district and State defendants except that people under contract to the New District would be paid by the New District. The Opinion at 124 will be clarified by substituting "salary" for "such" at line 18 so that the relevant sentence reads:

> Should in-service training be required subsequent to June 30, 1978 all salary costs will be shared equally between the single district and State defendants, with the exception of covered salaries paid under individual contracts which shall be assumed by the NCCPBE.

The state is obliged to maintain the level of support equal to the higher of that provided in fiscal year 1977 or

* As an example, the Court takes judicial notice that on January 18, 1978 the Delaware State House of Representatives passed H. B. 684 authorizing the Marshallton-McKean district to transfer $90,000 from its debt service account to its current operating budget for the current school year. If this bill were to become law, one could argue the data underlying the methodology has been affected and a higher per pupil expenditure was actually effective during the current year.

1978. Statements to that effect in the Opinion and Order are capable of only that interpretation. The Board has expressed concern that such statements could be narrowly read to merely guarantee state support for human relations and related personnel necessitated by the desegregation process. It is extremely difficult to entertain such a construction. Desegregation personnel were not provided in 1977 and the language used is clear and unqualified. Consequently, although clarification, if needed, has been supplied, the request for modification is denied.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JANUARY 20, 1978

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 1816-1822

BRENDA EVANS, et al.,
Plaintiffs,

v.

MADELINE BUCHANAN, et al.,
Defendants.

ORDER

At Wilmington this 20th day of January 1978, the Court having considered the Motion of the New Castle County Planning Board of Education for modification and clarification of the Opinion and Order issued on January 9, 1978, and a motion by Hispanic plaintiffs,

IT IS ORDERED

1. Amend paragraph A(4)(a) of the Order of January 9, 1978 as follows: At line 9 add a period after the word "valuation" and delete: "plus up to a maximum authorized rate of $.05 per $100 of assessed valuation for tuition pursuant to 14 Del. C. Chapter 6 and up to $.03 per $100 of assessed valuation for minor capital improvements." In its place *add* the following two sentences: In addition, the School Board of the New District is authorized to establish, levy and collect a maximum rate of $.05 per $100 of assessed valuation for tuition pursuant to 14 Del. C. Chapter 6 and a maximum rate of $.03 per $100 of assessed valuation for minor capital improvements for the fiscal year commencing July 1, 1978. Every year thereafter the taxation rates for tuition and minor capital improvements shall be determined by the School Board.

Paragraph A(4)(a) now reads:

The School Board of the New District may, without election or referendum, in addition to the amounts apportioned or otherwise paid to it by the State Board of Education, or appropriated to it by the General Assembly, or otherwise paid to it by the State Treasurer, establish, levy and collect additional taxes for current operating expenditures upon the assessed value of real estate in such district up to a maximum authorized rate of $1.91 per $100 of assessed valuation. In addition, the School Board of the New District is authorized to establish, levy and collect a maximum rate of $.05 per $100 of assessed valuation for tuition pursuant to 14 Del. C. Chapter 6 and a maximum rate of $.03 per $100 of assessed valuation for minor capital improvements for the fiscal year commencing July 1, 1978. Every year thereafter the taxation rates for tuition and minor capital improvements shall be determined by the School Board. The levy of any tax for current operating expenses in excess of the maximum authorization shall in all respects be subject to the provisions of Title 14 Del. C., Chapter 19, Subchapter I.

2. At pages 124 line 18 of the January 9, 1978 Opinion, the word "such" is changed to "salary."

/s/ MURRAY M. SCHWARTZ
Murray M. Schwartz
United States District Judge

Supreme Court, U. S.
FILED
NOV 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-671 & 78-672

DELAWARE STATE BOARD OF EDUCATION and ALEXIS I. DuPONT SCHOOL DISTRICT, et al.,

Petitioners,

vs.

BRENDA EVANS, et al.,

Respondents.

PLAINTIFF'S BRIEF IN OPPOSITION TO CERTIORARI

LOUIS L. REDDING
1200 Farmers Bank Building
Wilmington, Delaware 19801

JOSEPH A. ROSENTHAL
IRVING MORRIS
Morris & Rosenthal, P.A.
One Customs House Square
Customs House Plaza
P.O. Box 1070
Wilmington, Delaware 19899

LOUIS R. LUCAS
Ratner, Sugarmon, Lucas,
and Henderson
525 Commerce Title Building
Memphis, Tennessee 38103

PAUL R. DIMOND
O'Brien, Moran and Dimond
320 North Main Street
Ann Arbor, Michigan 48104

WILLIAM L. TAYLOR
Center For National Policy Review
Catholic University Law School
Washington, D.C. 20064

Attorneys for Plaintiffs-Respondents Brenda Evans, et al.

Reprographics Inc., 1732 Eye St. N.W., Washington, D.C. 20006 (202) 298-5537

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IN THE

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OCTOBER TERM, 1978

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DELAWARE STATE BOARD OF EDUCATION and ALEXIS I. DuPONT SCHOOL DISTRICT, et al.,

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vs.

BRENDA EVANS, et al.,

Respondents.

PLAINTIFF'S BRIEF IN OPPOSITION TO CERTIORARI

QUESTION PRESENTED

Given this Court's prior affirmance of the interdistrict liability ruling and prior refusal to review the primary remedy decree establishing the scope of desegregation and the framework necessary for dismantling the interdistrict dual system, does the subsequent secondary remedy decree approved by the courts below to implement these prior decisions raise any new issue warranting this Court's review?

STATEMENT

A. Introduction

For the fourth time in three years, the Delaware State Board of Education and seven other Petitioners (local school districts) seek to invoke this Court's jurisdiction to

review lower court rulings that the unconstitutional actions by the State of Delaware and responsible state and local school authorities caused the school segregation in Northern New Castle County on an interdistrict or area-wide basis and that an interdistrict remedy must therefore be implemented of commensurate scope. As in their prior efforts, Petitioners persist both in regarding almost no issue in this case as having been settled by this Court's prior dispositions and in making sweeping mischaracterizations of the rulings and proceedings below. This time the local school district Petitioners also suggest (*e.g.*, Pet. 11, 16, 23-25, 35-36) that the previously settled law of this case as to both violation and remedy should now be scuttled, along with the desegregation plan that has been implemented, on the asserted ground that this Court did not know what it was doing when it first affirmed (423 U.S. 963) the interdistrict liability ruling of the Three-Judge Court (393 F.Supp. 428) and then denied certiorari (434 U.S. 880) from the Third Circuit's affirmance (555 F.2d 373) of the primary remedy decree (416 F.Supp. 328) ordering that the scope of relief fit the interdistrict nature and area-wide extent of the violation.

A summary of the prior proceedings and rulings may assist in showing that the lower courts applied the proper legal standards for violation and remedy, that this Court's prior dispositions were fully informed and resolved the major violation and remedy issues, and that the details of the secondary remedy decree approved below raise no new issue worthy of review.

B. Prior Proceedings

This is the last phase of a lawsuit begun in 1957 whose "object was to eliminate *de jure* segregation in Delaware schools," including those of New Castle County as well as other areas of the state. 393 F.Supp. at 430. Although a plan for desegregation of Delaware schools was accepted

in 1961, the District Court approved the plan "only to the extent that it [would prove] effective," 379 F.Supp. 1218, 1222 (1974), and retained jurisdiction, 195 F.Supp. 321, 325 (1961). The plan did not prove effective in New Castle County. 379 F.Supp. at 1223 and 1228-30; 393 F.Supp. at 433, 437-438.

The interdistrict violations later found were rooted in circumstances existing at the time of *Brown v. Board of Education*. Local school districts in Delaware at that time were "not meaningfully 'separate and autonomous,' " 393 F.Supp. at 437, but rather were subordinate to the State system of segregation with boundaries that were dual and overlapping, permeable, or disregarded for the purpose of imposing racially segregated schooling. To deal with this, the District Court's 1961 decree ordered, as part of the plan for desegregation, the State Board to submit a revised school code to the legislature, including a reorganization of the "crazy-quilt pattern of [school] districts and laws governing education." 195 F.Supp. at 325.

In belated response, the legislature in 1968 enacted the Educational Advancement Act which explicitly excluded the Wilmington school district from the discretion vested in the State Board to reorganize all districts in the state, expressly providing that the boundaries for this "reorganized school district shall be the City of Wilmington with the territory within its limits." 14 Del. C. §§1004(c)(2), 1004(c)(4), and 1005.

In 1971, plaintiffs, by amended complaint, petitioned the District Court for supplemental relief; challenged the constitutionality of the 1968 Act and redistricting; and requested that the continuing interdistrict segregation in New Castle County be finally and effectively dismantled. A three-judge court was convened pursuant to 28 U.S.C. 2281. On July 12, 1974, following a lengthy evidentiary hearing, briefs and argument, the Three-Judge Court found

continuing *de jure* violations within Wilmington, but reserved ruling on the claims of interdistrict segregation including the constitutionality of the 1968 Act. 379 F.Supp. 1218.

After this Court issued its opinion in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), the Three-Judge Court promptly invited the reorganized school districts of New Castle County to intervene and present evidence on all the issues raised by plaintiffs' 1971 Petition for Supplemental Relief and Amended Complaint. Suburban school districts intervened as parties defendant;[1] they elected to adopt the State Board pleadings and to stand on the evidence already of record and to submit briefs on the interdistrict violation issues and the impact of *Milliken*. Primary issues litigated by the parties included the alleged continuing nature of the historic interdistrict dual system; the purpose and effect of acts following *Brown*, including a state-wide reorganization of school districts, alleged to be either independent constitutional violations or ineffective means of eliminating the continuing effects of the historic interdistrict *de jure* segregation; and the extent to which the existing racial disparity in enrollments between Wilmington and suburban New Castle County school districts resulted from the interdistrict effect of any constitutional violations rather than other causes.

Liability Ruling. On March 27, 1975, the Three-Judge Court, Judge Layton dissenting, expressly applied the *Milliken* legal standards (393 F.Supp. at 431-432, 437-438, 446) to the record evidence and found:

1. The "historic arrangement for interdistrict segregation within New Castle County" (393 F.Supp. at 447) "was a cooperative venture involving both

[1] The Wilmington school district had previously intervened as a party plaintiff and joined in the Petition and Amended Com .plaint.

city and suburbs" to implement State-mandated "*de jure* segregation" (393 F.Supp. at 437); "at that time, in other words, Wilmington and suburban [school] districts were not meaningfully 'separate and autonomous.' " *Id.*

2. "Significant governmental involvement in interdistrict discrimination" (393 F.Supp. at 447), which perpetuated and augmented (393 F.Supp. at 432-438) rather than dismantled this historic arrangement for complete segregation on an interdistrict basis, is *"responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades."* 393 F.Supp. at 438 (emphasis supplied).

3. In addition, the Educational Advancement Act, which unconstitutionally redrew school district lines by excluding the Wilmington School District from consideration for reorganization or consolidation in the 1968 state-wide action, *"played a significant part in maintaining the racial identifiability of Wilmington and the surburban New Castle County school districts."* 393 F.Supp. at 445 (emphasis supplied).

Accordingly, the Three-Judge Court declared the provisions excluding Wilmington from the consolidation unconstitutional and directed the parties to submit alternative interdistrict and intradistrict desegregation plans. 393 F.Supp. at 447.

The defendants appealed the interdistrict violation judgment and order by invoking this Court's jurisdiction under 28 U.S.C. 1253. Plaintiffs filed a Motion to Dismiss or Affirm, arguing that there were substantial grounds for either disposition. This Court summarily affirmed the interdistrict violation ruling (Rehnquist, J., joined by Burger, C. J., and Powell, J., dissenting, on the grounds that the appeal did not lie under 28 U.S.C. 1253 within the Supreme Court's jurisdiction because the case was not one required to be heard by a three-judge court). 423 U.S. 963. The interdistrict liability ruling "thus constitutes the law of the

case. . ." *Buchanan* v. *Evans*, ____ U.S. ____ (No. A-188 Sept. 1, 1978), 47 L.W. 3127, 3128 (Brennan, Circuit Justice) (Slip Op. 4).

Primary Remedy Decree. Following evidentiary hearings on plans submitted, and expressly applying *Swann* and *Milliken* legal standards (416 F.Supp. 328, 338-341) to the record evidence and previously affirmed violation ruling, the Three-Judge Court recognized its remedial duty to insure relief that "will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred" (416 F.Supp. at 341). Based thereon, the Three-Judge Court found:

> 1. The unconstitutional acts previously found *"had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts,"* 416 F.Supp. at 339 (emphasis supplied).
>
> 2. The continuing unconstitutional action of the State, and the State Legislature and State Board, *"is a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County."* 416 F.Supp. at 339 (emphasis supplied).

3. Wilmington-only relief therefore would not remedy the area-wide impact of the violation. 416 F.Supp. at 341-344.

4. The free choice and magnet plans proposed are "inadequate as remedies" because those plans do not promise realistically to overcome the interdistrict impact of the violation (416 F.Supp. at 346); voluntary magnet proposals have not proven effective as remedies, and "no showing" was made that actual desegregation would "occur *in fact* as a part of the operation of magnet schools." 416 F.Supp. at 346.

5. In view of the difficulties with cross-district assignments between existing districts and court-ordered redistricting (416 F.Supp. at 347-351), interim "consolidation or reorganization is required" pursuant to the existing state law model subject at all

times to the State's adoption of any effective and constitutional alternative. 416 F.Supp. at 350-353, 357.[2]

6. In view of the area-wide impact of the violation, the geographic scope of the remedy must include Northern New Castle (except for Appoquinimink) (416 F.Supp. at 353-355); and the responsible school authority, insofar as it proposes to maintain one-race schools, will bear the burden of showing that such assignments are genuinely nondiscriminatory rather than the result of the continuing interdistrict "dual system." 416 F.Supp. at 355 and n.135; *see also* 416 F.Supp. at 357 n.149.

7. With respect to governance, the State Legislature should have the first opportunity to reorganize school districts; but, absent effective and constitutional legislative action, the provisional consolidation of the existing districts under a single interim board (made up of existing local school authorities appointed by the State Board) would go into operation no later than September, 1977 for secondary schools and September, 1978 for elementary schools, 416 F.Supp. at 357-358.

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[2] This decision was based on (a) the *defendants'* evidence and representation that transfers across existing districts would create administrative conflicts requiring constant judicial supervision and the Three-Judge Court's determination that it should leave such day-to-day school affairs in the hands of the responsible school authorities in order to avoid judicial intervention if a less intrusive remedy were available (416 F. Supp. at 347-348); and (b) the Three-Judge Court's view that any reorganization by redistricting would involve a variety of policy choices better left to the state legislature (416 F.Supp. at 350-352). As a result, the Three-Judge Court, in order to intrude as little as possible in state policy and local school administration, chose to rely on an interim consolidation (with planning and implementation in the hands of the responsible school authorities and reliance on existing state law) so long as the State chose not to take effective alternative action. 416 F.Supp. at 351-353, 357. In sum, this provisional or stand-by governance plan was specifically designed to *minimize* judicial intervention and to give responsible State authority the opportunity to come forward with an effective remedy. *See also* 555 F.2d at 380-381; Pet. App. All.

These ultimate fact findings and legal holdings concerning the extent of the continuing violation, the scope of its impact, requisite scope of desegregation, and the governance aspects of the remedial framework were amply supported by evidence, subsidiary fact findings, and law. As a result, they were specifically affirmed by the Court of Appeals (555 F.2d 573; *also* Pet. App. A13, A30), with the added direction that State authorities file with the District Court within sixty days a report of their efforts to carry out the mandate of the District Court (555 F.2d at 381; *also* Pet. App. A13).[3] So that there would be no misunderstanding of its judgment, the Court of Appeals detailed a revised, primary remedy decree to be entered by the District Court. *See* 555 F.2d at 381-382.

There was no confusion among the State and local defendants as to the area-wide scope of remedy thereby affirmed by the Court of Appeals' judgment, the provision for a third opportunity for the State to come forward with an effective alternative in the first instance, *and* the decreed consequences of a provisional consolidation of the affected districts so long as the State refused to come forward with an effective alternative. The defendants raised all of these remedy issues in their certiorari petitions to this Court arguing that the lower court's judgment failed to adhere to *Dayton, Milliken,* and/or *Gautreaux.* Plaintiffs responded that this primary remedy decree was fully supported by these decisions based on the particular circumstances, proceedings, evidence, and findings in this case. This Court denied certiorari (the Chief Justice, Mr. Justice Powell, and Mr. Justice Rehnquist dissenting by noting that they would grant the petitions, "vacate the judgment,

[3] The Third Circuit, like the Three-Judge Court, reviewed and affirmed the scope of the remedy pursuant to the *Milliken* legal standard governing the tailoring of equitable relief to do no more than overcome the proven effects of any constitutional violation. 555 F.2d at 379-380; *also* Pet. App. A11-A12, A30.

and remand the case . . . for further consideration in light of *Dayton*"). 434 U.S. 880 (1977), *rehearing denied,* 434 U.S. 944 (1977).[4]

"Reverse Volunteerism." Pursuant to the Third Circuit's direction, the District Court immediately entered the revised decree (*see* 555 F.2d at 381-382). Sixty days later the State Board filed its "Report" revealing that the State Legislature and State Board had taken no action (except for "liberalization" of the preexisting "free choice" inter-district transfer legislation). Instead, the State Board proposed that the District Court, in the absence of any implementing legislation or reorganization, order a "plan" dubbed "reverse volunteerism" whereby every Wilmington black student (but *only* these black students) would be reassigned to existing suburban districts with the absolute right to transfer back to the Wilmington district. Plaintiffs filed written objections and presented substantial evidence in opposition to show that the proposal (a) was as totally ineffective as the "free choice" plans and transfers previously rejected by the Three-Judge Court and (b), adding insult to this injury, was also racially stigmatizing in concept and wholly inequitable in operation. In contrast, defendants offered *no* evidence to show (a) that "reverse volunteerism," or any other voluntary transfer scheme, promised to operate in fact to remedy the continued marked racial disparity in enrollments between districts caused by the violation or (b) that the substantial area-wide impact of the inter-district violation was less extensive in any respect than previously found. Indeed, defendants represented that they had no such proof to offer. *E.g.,* Pet. App. A26; A153***.

[4] In the event that any member of the Court may wish to determine whether to reconsider the liability ruling or primary remedy decree, the subsidiary fact findings, rulings, and evidence supporting these judgments are discussed in plaintiffs' previous Brief in Opposition to Certiorari, October 1977 Term, in Nos. 77-131, et al. at pages 10-30.

After reviewing the prior proceedings and the evidence, the District Court on August 5, 1977 rejected "reverse volunteerism" both because it violated the mandate of the Third Circuit in failing to provide any supporting legislation or reorganization (Pet. App. A77-A78) and because it was wholly inequitable and totally ineffective as a remedy for the interdistrict violation of the nature, extent, and impact previously found by the Three-Judge Court (Pet. App. A78-A80).[5] At bottom, the proposal "like its reference to the legislative transfer plan, in which only three white students took part, . . . carried with it the tacit assumption that only — and that all — black students benefit from transferring to a white environment, and not vice versa." Pet. App. A17. "One would find it difficult to create a more graphic pardigm of an inequitable remedy than one which assigns to those who have been wronged the [sole] responsibility of correcting those wrongs." Pet. App. A78; *also* Pet. App. A18.[6] The Court of Appeals unanimously affirmed the District Court's determination that the State Board's Report and "reverse volunteerism" proposal represented nothing but an affirmative statement of the State's continuing default. Pet. App. A13-A19.

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[5] In evaluating the positions of the parties concerning the nature, extent, impact and effect of the continuing interdistrict violation (435 F.Supp. at 844-845), and reviewing the record evidence and Three-Judge Court findings, the District Court noted that (a) the "trier of fact" had previously found that "the vestiges of an interdistrict *de jure* segregated school system" had not been dismantled and (b) the "three-judge court made all the subsidiary findings with respect to discriminatory intent and incremental segregative effect (unless that phrase is to mean precise mathematical percentage) that the record permits without resort to sheer speculation." Pet. App. A88 and n.45.

[6] With respect to the defendants' claim that the legislature's stopgap "free choice" scheme "is adequate to overcome the dual school system and the pervasive effects of *de jure* segregation," the District Court found:

> Not only is the evidence to the contrary, but the voluntary transfer legislation suffers from the same basic flaws that proved fatal to the State Board's alternate proposal known as "reverse volunteerism" . . . Absent any evidence that [reverse volunteerism] would work and given the more than 20 years that the State has had to dismantle its dual system, this Court concluded that the plan's disparate [racial] burden and "too little, too late" character rendered it unacceptable under *Green* v. *County School Board*, 391 U.S. 430, 438-9 (1968; 435 F.Supp. 832, 841 (1977). The voluntary plan promises even less.

Pet. App. A134. Only *three* white students transferred into Wilmington schools (Pet. App. A16, A71 n.14); as a result, the *de jure* black schools remained virtually all-black under the State's "free transfer" legislation.

Secondary Remedy Decree. Pursuant to the Third Circuit's mandate, the District Court therefore directed the State Board to appoint the five members to the new interim school board, with four of the five members from the defendant suburban school districts and the fifth from the intervening plaintiff Wilmington School District. The District Court, however, granted a stay of the implementation previously scheduled for September, 1977 to allow the responsible school authorities additional time to plan and the defendants time to petition for review of the Third Circuit's affirmance of the Three-Judge Court's primary remedy decree. Pet. App. A94-A97; *also* Pet. App. A19.

In the fall, the District Court held extensive hearings on a "10-2" grade-center approach (with two grades in Wilmington and ten grades in the suburbs) proposed by the new Board majority, a regional clustering approach proposed by the new Board minority, and a modification of the Board's grade-center approach to provide for three grade-centers (including in Wilmington) in order to eliminate the inequitable and unjustifiably discriminatory aspects of "10-2" in the particular circumstances of this case. Once again no defendant offered any evidence (or alternative plan) to suggest that the scope of any of these remedial proposals was more extensive than the impact of the violation. *E.g.*, Pet. App. A26. And the new Board

the local school authority with the express responsibility under the mandate for assigning students, proposed no plan of lesser scope. In a detailed ruling, the District Court therefore authorized the new Board to exercise its discretion to develop, and then to implement commencing September, 1978, a plan of pupil reassignments based on a three-grade center approach. Pet. App. A150-A151.[7] In view of the procedural posture and law of the case, that was all that the District Court was required to do to insure, at long last, the transition to a racially nondiscriminatory system of pupil assignments in Northern New Castle County pursuant to the Third Circuit's express mandate, which this Court had previously declined to review.

In an abundance of caution, however, both the District Court and the Court of Appeals again evaluated the extent and continuing impact of the interdistrict violation, as

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[7] Even in this ruling, after extensive hearings and findings on the relevant issues dividing the litigants on the "10-2" or "9-3" concepts (Pet. App. A119-A151), the District Court invited the new Board to apply for relief from the "9-3" approach if it proved difficult in the development and detailing of an actual plan of reassignments. Pet. App. A151. The new Board thereafter developed and adopted a "9-3" plan of pupil assignments. No Petitioner argued in the Third Circuit that the District Court abused its discretion in acquiescing in the pupil assignment "grade-center" concept proposed by the responsible local school authority that was modified below only to the extent necessary to eliminate the racial inequity inherent in the "10-2" variation (Pet. App. A136-A151); and no Petitioner claims in this Court any error in the lower courts' acceptance of the grade-center concept proposed by the new Board. Instead their attack was, and is, solely on prior decisions of the lower courts determining the scope of violation and remedy and rejecting proposals predicated solely on volunteerism.

Similarly, the local district defendants did not contest in the District Court or on appeal the manifest propriety, on the uncontroverted evidence presented, of the ancillary relief approved generally below (*see* Pet. App. A162-A169). With the Third Circuit's ruling finally approving the ancillary relief ordered (Pet. App. A32-A47) and preliminarily approving the authorization and cap on local taxes to support the new district subsequently passed by the legislature (Pet. App. A48-A61), the State Board apparently has also dropped any claim of error on this score in its Petition.

found by the Three-Judge Court, to insure that the scope of the remedy finally approved would match the current effect of the violation. Pet. App. A11-A12, A22-A31, A152-A156. Reiterating that the Three-Judge Court had already specifically applied the appropriate remedial standard articulated by this Court (Pet. App. A130, A152, A30; 416 F.Supp. at 341), the District Court, as affirmed by the Court of Appeals, found that, "in satisfying its [remedial] duty, the Three-Judge Court relied primarily upon *Milliken I* and *Swann, supra,* and made the detailed findings of fact and reasoned statement of law later explicitly required by *Dayton.*" Pet. App. A152; *also* Pet. App. A30.[8] With respect to discriminatory intent and "incremental segregative effect," the District Court reiterated "its prior holding that 'the three-judge court made all the subsidiary findings . . . that the record permits without resort to sheer speculation.'" A153***. The District Court concluded by holding:

> . . . the firmly established constitutional violations in this case are the perpetuation of a dual school system and the vestige effects of pervasive *de jure* inter-district segregation. *Evans* v. *Buchanan,* 416 F.Supp. at 343; 393 F.Supp. at 432-38, 445, 447. *Dayton* reaffirms that "[o]nce a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" 97 S.Ct. at 2775; *see Milliken I,* 418 U.S. at 744; *Swann,* 402 U.S. at 16. Eradication of the constitutional violation to the scope and extent enumerated by the three-judge court is all that any of the plans and concepts submitted purport to ac-

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[8] Both the Three-Judge Court and the Court of Appeals in first shaping and then reviewing the remedial framework through the conscientious application of *Swann* and *Milliken* legal standards had previously used the "*same* precepts" (Pet. App. A12) for judging causation and the appropriate scope of remedy subsequently announced by this Court in *Dayton. See also Statement, supra,* pp. 6-7 and 8 n.3.

> complish, and that is all the concept endorsed by the Court does accomplish.

A156. Thus did the District Court meet its "duty" under the mandates of *Brown* and of the Third Circuit "to insure the elimination of the interdistrict racially discriminatory dual school system that has persisted in New Castle County." Pet. App. A130.

Noting that the "condition that [here] offends the Constitution," *Swann*, 402 U.S. at 17, is "pervasive *de jure* interdistrict segregation throughout Wilmington and the named Northern New Castle County school districts," the Court of Appeals affirmed the trial court's approval of the new Board's proposal in order "to restore" area schools to the status they "would have enjoyed but for the constitutional violations." Pet. App. A25; *also* Pet. App. A26-A30.

The Court of Appeals concluded by reiterating that "the primary responsibility to devise a suitable plan [for Northern New Castle County] was and is that of the State of Delaware" and had been at least since *Brown*. Pet. App. A30-A31; *see also* Pet. App. A11, A19, A26-A27. After having "dragged its heels and obstructed progress toward desegregation for twenty-six years" (Pet. App. A27), the plan approved by the courts below "was promulgated" and remains in place "only because the State, through its legislature or its board of education" has thus far "failed to come forward" with an effective alternative. Pet. App. A61; *also* Pet. App. A134-A136.

> State authorities are still invited, nay, urged, to come forward with meaningful solutions to this vexing problem, solutions that will achieve the same objectives as the court-ordered plan. Continued criticism, organized or otherwise, formal or informal, of the plan ordered by the federal courts as a last resort, is an insufficient and ill-advised response to the void caused by State inaction.

Pet. App. A62, A134-A136.

This continuing invitation by the Court of Appeals, in the face of the State's longstanding and steadfast default, is consistent with the studied restraint and deference of the lower courts here: to go to "virtually unprecedented lengths to minimize federal court intrusion," to "defer to the State Legislature to cure the constitutional violation," to afford several years of delay "to promote an orderly transition," and only to intervene to guarantee relief to the extent necessary by establishing a provisional consolidation controlled by local school authorities pursuant to the existing state law model and to remain in operation only so long as the State defaults by choosing not to come forward with an effective and constitutional alternative. Pet. App. A105; *also, e.g.*, Pet. App. A11, 416 F.Supp. at 357.

Following the denials by Justices Brennan and Rehnquist of stay applications, the new Board this September implemented its plan dismantling, at long last, the interdistrict dual system that heretofore has riven public schooling throughout Northern New Castle County on a racially dual basis.

REASONS FOR DENYING CERTIORARI

1. The substantiality and extent of the interdistrict *de jure* segregation violation in Northern New Castle County Public Schools has long since been adjudicated by the Three-Judge Court, and affirmed by this Court, pursuant to the application of the *Milliken* legal standard to the record evidence. Petitioners' attempt to recast the determinations of the Three-Judge Court on this score are at best belated attempts to relitigate factual issues which they finally lost on the evidence and factual findings three years ago before the Three-Judge Court, 393 F.Supp. 428, *aff'd* 423 U.S. 963. There is no reason to reexamine the settled law of the case concerning the nature and extent of the violation.

2. Similarly, the Three-Judge Court's restrained exercise of equitable discretion in fashioning the primary remedy decree pursuant to the *Swann* and *Milliken* standards, 416 F.Supp. 328, has long since been affirmed by the Court of Appeals, 555 F.2d 373, with review being denied by this Court. 434 U.S. 880. Given the nature and extent of the established interdistrict violation — "the interdistrict racially discriminatory dual system that has persisted in New Castle County" since *Brown* (Pet. App. A130) — the lower courts, of course, had "a duty to prescribe appropriate remedies." *Milliken* v. *Bradley*, 418 U.S. at 744; *Brown II*, 349 U.S. 294, 300-301. As to the structure for governing and administering the requisite interdistrict relief, three alternatives were available: retaining existing districts with transfers across district lines, redrawing school district lines, or consolidation pursuant to the existing state law model. Given the defendants' objections (and substantial proof in opposition) to retaining existing districts and the greater judicial intervention into local school operations and state policy choices required by cross-district assignments or redrawing school district boundaries, the Three-Judge Court did not err in choosing the least intrusive alternative: consolidation pursuant to the existing state law model with racially unitary schools operated by a new local school board. In fact, the Three-Judge Court proceded with restraint by making this reorganization provisional on the State's adoption of any constitutional and effective alternative and by giving the State ample time to respond before requiring implementation of even this stand-by remedy.[9]

[9] The lower courts scrupulously adhered to existing state policy and practice in making the new Board the operational equivalent of every other local district in Delaware and thereby keeping the federal courts out of the business of running the public schools. (And the new Board is most assuredly *not* a surrogate for the District Court nor an appointed Master. The new Board was appointed by the Defendant State Board; four of its five members are managing agent board members of the suburban districts; and the new Board, its staff and teachers operate independently of the District Court just like any other local school board.) How the lower court's shaping of the required inter-district relief in this least intrusive and most restrained fashion imaginable — taking the concerns of the State and local districts into full account, deferring to the existing State law models and practice, and inviting the State to come forward with any effective alternative it might choose — could be compared to a "railroad reorganization" in Mr. Justice Rehnquist's opinion denying a renewed application for stay is a mystery. *Alexis I. DuPont School District* v. *Evans*, ____ U.S. ____ (No. A-188) (Sept. 8, 1978) (Slip Op. 4). The suggested comparison simply does not fit what has actually happened in this case. The Three-Judge Court and the District Court expressly relied on this Court's counsel in *Milliken I*, 418 U.S. at 742-744, and chose the least intrtusive approach of the provisional consolidatiton under the new Board subject to timely and alternative action by the State, precisely because it (a) *totally* avoided judicial involvement "in the day to day management of school affairs" (Mr. Justice Rehnquist's Stay Opinion, Slip Op. 4) and (b) gave the State every opportunity to exercise its policy choices and popular will to substitute any other constitutional school district arrangement. *See, e.g.*, 416 F.Supp. at 347-348, 350-353, 357.

The Third Circuit on appeal the first time, and this Court in denying review, therefore made no mistake in rejecting the defendants' claim of an abuse of discretion in the face of the State's continued decision not to propose any effective alternative. In essence, the defendants disagreed not with the Three-Judge Court's choice of one of the three available structural alternatives but rather with the Court's very "duty to prescribe appropriate remedies" at all in such circumstances. As that duty had long since been settled generally for federal remedy and *de jure* school cases (*see, e.g., Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *Brown II*, 349 U.S. 294, 300-301 (1955)) and interdistrict school segregation cases in particular (*see Milliken I*, 418 U.S. at 744, and *Brown II*, *supra*), the Third Circuit affirmed the primary remedy decree and this Court quite properly denied review. 555 F.2d 373, *cert. denied* 434 U.S. 880.

Similarly, the defendants' challenge to the scope of de-

segregation required by the Three-Judge Court on appeal to the Third Circuit the first time did not concern the extent of the relief actually tailored but rather the established duty (*see Swann*, 402 U.S. at 16-17, 24-26 and *Milliken I*, 418 U.S. at 744, 746) to "place the victims of the violation in substantially the position which they would have occupied had the violation not occurred" (416 F.Supp. at 341) by redressing the area-wide effect of the pervasive interdistrict violation. The Third Circuit on appeal from the primary decree, and this Court in denying review, therefore did not err in rejecting defendants' challenge to the basic duty itself. 555 F.2d 373, *cert. denied* 434 U.S. 880.

In their latest pleas to this Court, from the affirmance of the secondary remedy decree, Petitioners merely parrot their previous challenge to the basic duties already met in the primary remedy decree: (a) to prescribe an appropriate interdistrict remedy and (b) to overcome the area-wide impact of the substantial interdistrict violation by requiring desegregation to the same scope and extent. Given the fact that the District Court, in its secondary remedy judgment did no more than implement the primary remedy decree by tailoring the relief to eradicate but not exceed the adjudicated effects of the violation, as unanimously affirmed by the Court of Appeals, the Petitioners present no reason for this Court to reexamine the basic remedial duties already established for school cases generally and previously settled in this case.

3. With respect to the relatively narrow issues thereby left open for review at this time, Petitioners make no claim of error at all. *See* Statements note 7, p. 12, *supra*. First the suburban school district and State Petitioners make *no* claim of error concerning the lower courts' approval of the grade-center pupil assignment concept proposed by the new Board, as modified by the District Court to prevent gross racial discrimination against black students in the

reassignment process. The suburban school district and State Petitioners opposed the alternative regional clustering and pairing concept and strenuously preferred the new Board's grade-center approach in the trial court; and Petitioners made no claim of error concerning grade centers in their appeals to the Third Circuit. Under this Court's normal rules for refusing review in such circumstances, the District Court's decision to defer to the responsible school authorities' preference by approving the grade-center approach presents *no* issue for this Court. *Cf. Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); and *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 330 (1967).[10]

Second, suburban school district petitioners supported

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[10] We are therefore at a loss to understand why Justice Rehnquist in his opinion denying a renewed application for stay criticizes this aspect of the decision below. *Alexis I. DuPont School District* v. *Evans*, ____ U.S. ____ (No. A-188) (Sept. 8, 1978) (Slip Op. 3). Moreover, the lower courts never reviewed the specific pupil assignments adopted by the new Board subsequent to the District Court's approval of the Board's recommended concept; the specific pupil assignments were properly vested in the sound discretion of the responsible school officials in thet first instance. *E.g., Swann*, 402 U.S. at 15-16. State and suburban school district defendants did not object in the trial court nor the court of appeals to the specific pupil assignments finally developed and adopted by the new Board in the exercise of its discretion. Despite Justice Rehnquist's invitation, we do not understand that either of the certiorari petitions even suggests that this Court should review the decision of the District Court to defer to the new Board's proposed grade-center approach as modified rather than approving the alternative regional approach or the court itself drawing a pupil assignment plan. As a result, the District Court's approval of the grade-center approach is not an issue for review, Rule 23(1)(c), Supreme Court Rules. But, even if the issue had been preserved and raised by Petitioners, it would *not* relate to the District Court's intervening in the affairs of he local school authority by drawing a Court plan as suggested in Mr. Justice Rehnquist's stay opinion (Slip Op. 3-4) because the Court here deferred to the local school authority by allowing the new Board to draw and to adopt the plan of pupil assignments based on the Board's own preferred grade-center approach.

the relief ancillary to pupil assignments finally approved by the lower courts pursuant to *Milliken II*, 433 U.S. 267 (1977), and the uncontroverted record evidence. The State Petitioners objected to such relief in the courts below apparently on the grounds that *Milliken II* was wrongly decided. But the State Board presented *no* proof to controvert the substantial evidence introduced in the District Court showing that such ancillary relief was necessary to overcome the effects of the violation as specifically found by the District Court (Pet. App. A162 *et seq.*) and unanimously affirmed by the Court of Appeals (Pet. App. A32-A46). In their Petition, the State defendants therefore understandably make *no* reference to this issue in their questions presented and argument and only a fleeting reference to ancillary relief at all in their statement (Pet. 7). Whether or not Supreme Court Rules 23(1)(c) and 40 (1)(d)(2) effectively bar consideration of the issue, there is absolutely no conflict between the restrained general guidelines for ancillary relief approved below and *Milliken II*, and *no* other reason for this Court to review the issue in view of the lower courts' express application of *Milliken II* to the uncontroverted record.

* * * * * * * *

In sum, Petitioners have failed to demonstrate any error in the Court of Appeals' judgment affirming the secondary remedy decree, any departure by the lower courts from this Court's violation and remedy standards, and any reason to revisit the settled law of this case. The official racial discrimination that for so long has divided public schooling in Northern New Castle County is at an end and the transition to racially nondiscriminatory schooling contemplated by *Brown* is finally in progress. The State of Delaware, the responsible state and local school authorities, and the people of Northern New Castle County are at last rid of the blight of racially dual schooling. They are free

to operate area schools in whatever constitutional way they deem fit, now and hereafter.

CONCLUSION

Wherefore, for the foregoing reasons, the Petition for a Writ of Certiorari should be denied forthwith.

Respectfully submitted,

LOUIS L. REDDING
1200 Farmers Bank Building
Wilmington, Delaware 19801

JOSEPH A. ROSENTHAL
IRVING MORRIS
Morris & Rosenthal, P.A.
One Customs House Square
Customs House Plaza
P.O. Box 1070
Wilmington, Delaware 19899

LOUIS R. LUCAS
Ratner, Sugarmon, Lucas,
and Henderson
525 Commerce Title Building
Memphis, Tennessee 38103

PAUL R. DIMOND
O'Brien, Moran and Dimond
320 North Main Street
Ann Arbor, Michigan 48104

WILLIAM L. TAYLOR
Center For National Policy Review
Catholic University Law School
Washington, D.C. 20064

Attorneys for Plaintiffs-Respondents
Brenda Evans, et al.

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